

IN THE SUPREME COURT OF FLORIDA

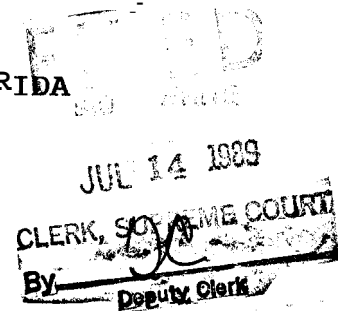
CHARLES EDWARD CARTER,

Appellant,

vs .

STATE OF FLORIDA,

Appellee.



Case No. 73,089

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

BRIEF OF APPELLEE

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	3
<u>ISSUE I</u>	3
WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHOSE PREJUDICIAL EFFECT ALLEGEDLY OUTWEIGHED ITS PROBATIVE VALUE?	
<u>ISSUE II</u>	7
WHETHER THE PROSECUTOR'S ARGUMENT DURING CLOSING DENIED APPELLANT A FAIR TRIAL?	
<u>ISSUE III</u>	9
WHETHER THERE IS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION?	
<u>ISSUE IV</u>	12
WHETHER THE IMPOSITION OF DEATH IS APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE?	
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	16

TABLE OF CITATIONS

	<u>PAGE NO.</u>
<u>Bates v. State,</u> 465 So.2d 490, 492 (Fla. 1985),	14
<u>Bertolotti v. State.,</u> 534 So.2d 386, 387 n.3 (Fla. 1988),	13
<u>Breedlove v. State,</u> 413 So.2d 1 (Fla. 1982),	7
<u>Brown v. State,</u> 473 So.2d 1260 (Fla. 1985),	11, 13-15
<u>Brown v. State,</u> 526 So.2d 903 (Fla. 1988),	11
<u>Bryan v. State,</u> 533 So.2d 744, 747 (Fla. 1988),	4
<u>Cabana v. Bullock,</u> 474 U.S. 376 (1986),	12
<u>Castillo v. State,</u> 412 So.2d 36 (Fla. 3d DCA 1982),	5
<u>Clark v. State,</u> 379 So.2d 97 (Fla. 1980),	11
<u>Craig v. State,</u> 510 So.2d 857 (Fla. 1987),	7
<u>Darden v. State,</u> 329 So.2d 287, 291 (Fla. 1976),	7
<u>Enmund v. Florida,</u> 458 U.S. 782 (1982),	12
<u>Garcia v. State,</u> 492 So.2d 360, 366 (Fla. 1986),	13
<u>Henderson v. State,</u> 463 So.2d 196, 200 (Fla. 1985),	3
<u>Jackson v. State,</u> 502 So.2d 409 (Fla. 1986), <i>cert. denied</i> , 96 L.Ed.2d 686 (1987),	12

<u>Jent v. State</u> , 408 So.2d 1024, 1028 (Fla. 1982),	6, 11
<u>Lowenfield v. Phelps</u> , 98 L.Ed.2d 568 (1988),	13
<u>Mabery v. State</u> , 303 So.2d 369 (Fla. 3d DCA 1974),	5
<u>McCrae v. State</u> , 395 So.2d 1145 (Fla. 1981),	5
<u>Parker v. State</u> , 76 So.2d 134 (Fla. 1985),	14
<u>Robinson v. State</u> , 20 So.2d 1 (Fla. 1988),	6
<u>Spencer v. State</u> , 133 So.2d 729 (Fla. 1961),	7
<u>State v. Page</u> , 449 So.2d 813 (Fla. 1984),	5
<u>Tedder v. State</u> , 322 So.2d 908 (Fla. 1975),	13
<u>Thomas v. State</u> , 24 So.2d 193 (Fla. 5th DCA 1983),	5
<u>United States v. Caporale</u> , 806 F.2d 1487 (11th Cir. 1986),	7

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts as a substantially accurate, though argumentative, account of the facts adduced below.

SUMMARY OF THE ARGUMENT

Appellant's first claim that he was prejudiced by the introduction of irrelevant evidence is unavailing as the evidence was relevant to a material proposition in the cause, or rebutted appellant's delusive innuendos, or was otherwise unobjected to.

Appellant's failure to object to the prosecutor's argument during closing bars subsequent review of this issue on appeal.

As to issue 111, the state contends that there is substantial, competent evidence to support appellant's convictions.

As to issue IV, appellant's reliance on Enmund v. Florida, *infra*, is misplaced since the requisite finding was made by the trial court. Second, the trial court utilized the proper standard in finding the existence of aggravating factors, and these factors were supported by the evidence. And third, the trial court properly overrode the jury recommendation of life in light of the five aggravating factors with no evidence in mitigation.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHOSE PREJUDICIAL EFFECT ALLEGEDLY OUTWEIGHED ITS PROBATIVE VALUE?

Appellant raises five points herein contending that the admission of certain evidence and testimony denied him a fair trial. The state will address each point in the order in which they are presented.

Appellant's first claim involves the admission of two photographs of the victim. During direct examination of the crime scene technician, the state was allowed to introduce two photographs of the victim who was in an advanced state of decomposition (R 183). Exhibit six depicted a ligature or gag tied around the victim's head; exhibit seventy-six depicted ligatures binding the victim's hands and the feet, and ligatures binding the hands to the feet (R 181-182). The state contends that the photographs were properly admitted as they were independently relevant to show the probable cause of death, to prove an essential element of the kidnapping charge and to corroborate Johnny Johnson's version of the events surrounding Millie Worden's death. *See Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985).

Appellant next claims that the admission of his gun and knife into evidence was erroneous as they were offered to show his violent disposition. The state disagrees and contends that

the items were relevant to prove his presence in North Carolina and his subsequent return to Florida. Although appellant conceded that he was in North Carolina, the state was nevertheless required to prove every fact put in issue by his plea of not guilty. *See Bryan v. State*, 533 So.2d 744, 747 (Fla. 1988). However, should this Court determine that the admission of this evidence is error, then, for the following reasons, the error must be deemed harmless.

Toni Freeman was appellant's girlfriend. She testified that appellant left his knife in her purse and his gun in her car when he fled from the police (R 438-439). The state was previously allowed to show that appellant acquired these items in North Carolina. On cross-examination, Freeman testified that appellant gave her the gun for her protection (R 446). Clearly, appellant was not prejudiced by admission of these items as there was no indication that he acquired the weapons by unlawful means or that their possession was otherwise unlawful. Moreover, appellant was able to show that he had an altruistic motive for possession of the gun, and there was no showing of a sinister motive for his possessing the pocketknife. It cannot therefore be said that the admission of the gun or knife was harmful. *Bryan, supra*.

Appellant next contends that the trial court erred in allowing the state to cross-examine him about his burglary of an automobile. On direct examination, appellant left the impression that he abandoned his van because his driver's license was suspended for traffic violations (R 780). On cross-examination,

the state was allowed to elicit testimony that appellant had recently burglarized a deputy's truck, and that some of the stolen items were still in the van when it was impounded (R 836). The state contends that it was properly allowed to elicit this testimony to rebut appellant's "delusive innuendo" that he abandoned his van for seemingly innocuous reasons. *See McCrae v. State*, 395 So.2d 1145 (Fla. 1981).

Appellant's fourth claim, that the prosecutor violated the Williams rule by eliciting testimony regarding his use of drugs, is barred from review by his failure to interpose a timely objection. *See Castillo v. State*, 412 So.2d 36 (Fla. 3d DCA 1982). Also, appellant's failure to move for a curative instruction likewise bars review of this issue. Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974).

Appellant's last claim, that the prosecutor over-stepped the bounds of impeachment by inquiring into the nature of his prior convictions, is also barred from review by his failure to object. Thomas v. State, 424 So.2d 193 (Fla. 5th DCA 1983). Moreover, the prosecutor limited his inquiry to convictions that appellant deleted on direct examination and which were the proper subject matter of impeachment. *See State v. Page*, 449 So.2d 813 (Fla. 1984).

In conclusion, the state would note that the trial court has broad discretion in controlling the conduct of counsel and in deciding to admit or exclude evidence, and, absent an abuse of that discretion, the trial court's ruling on such matters will

not be disturbed on appeal. Robinson v. State, 520 So.2d 1 (Fla. 1988); Jent v. State, 408 So.2d 1024 (Fla. 1982).

Appellant's convictions must be affirmed.

ISSUE II

WHETHER THE PROSECUTOR'S ARGUMENT DURING CLOSING DENIED APPELLANT A FAIR TRIAL?

Appellant contends that the prosecutor's argument during closing constitutes "inexcusable prosecutorial overkill" which warrants a new trial. Appellant's contention is unavailing.

First, the state asserts that appellant's failure to object below bars subsequent review of this issue on appeal. *See Darden v. State*, 329 So.2d 287, 291 (Fla. 1976).

Second, the remarks complained of concerning the strength of the state's case or the weakness of appellant's were properly based upon the evidence adduced during trial and upon the logical inferences derived therefrom. *Spencer v. State*, 133 So.2d 729 (Fla. 1961).

Third, the prosecutor's comment that Johnny Johnson is telling you the truth does not constitute improper vouching as appellant's cross-examination and closing argument put Johnson's credibility in issue. *Craig v. State*, 510 So.2d 857 (Fla. 1987); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986).

Fourth, the prosecutor's characterization of appellant as a "liar" and a "thief" was proper argument based upon the evidence adduced at trial especially since appellant took the stand and put his credibility in issue. *Craig*, at 865.

Noting the wide latitude permitted in arguing to a jury, *Breedlove v. State*, 413 So.2d 1 (Fla. 1982), it cannot be said that the remarks complained of were so prejudicial that the jury

was influenced to reach a more severe verdict than it would have otherwise done. Darden.

Appellant's convictions must be affirmed.

ISSUE III

WHETHER THERE IS SUBSTANTIAL, COMPETENT
EVIDENCE TO SUPPORT APPELLANT'S CONVICTION?

Appellant contends that the evidence is insufficient to support his convictions for first-degree murder, kidnapping and robbery. The state contends otherwise.

It was undisputed below that appellant and Johnny Johnson were with the victim on the day she disappeared. It was also undisputed that the two left the state in the victim's car shortly after her disappearance, and that they used her credit cards during their journey. Appellant's only dispute is that he was not with the victim during the time of her abduction and disposal. The evidence proves otherwise.

Fifteen-year-old Johnny Johnson testified that both he and appellant were in the victim's home on the night of her demise. He testified that at one point during the evening, appellant was on the telephone with his girlfriend, and the victim was in the kitchen doing some cleaning (R 533). After appellant got off the phone, he approached Johnson with a plan to steal the victim's car (R 534). Johnson summoned the victim into the hall while appellant approached her from behind and grabbed her around the neck (R 539). Appellant began choking her and the two started to fight (R 540). Johnson thereupon went into the kitchen and threw up. When Johnson returned, the victim was on her bed with appellant holding her hands. The victim "wasn't moving". (R 541). Johnson went into the bathroom and again threw up.

Appellant saw this, and he began throwing up. Appellant told Johnson to grab some sheets so that appellant could wrap up the victim. The two cut a television chord, and appellant tied the victim's hands (R 544-545). Johnson took another chord and, after they cut it, he began tying the victim's feet (R 547). Appellant took over and he finished binding her feet. Johnson testified that he believed the victim was alive at this time (R 547). Appellant then wrapped more sheets around the victim (R 549). The two took the victim out to the car and put her into the trunk (R 551). Johnson testified that he heard the victim "groan or something" when they put her into the trunk (R 552). He believed that the victim was still alive (R 552). Johnson went back into the house to retrieve various appliances and power tools (R 555-557). The two then drove to an abandoned house in Altruas (R 558). Johnson helped lift the victim onto appellant's shoulders; appellant walked up to the house and threw the victim through the screen window onto the porch (R 561). When appellant threw the victim onto the porch, Johnson testified he heard the victim say, "let me out of here or something." (R 562). Johnson's testimony corroborated the physical evidence adduced at trial.

The medical examiner opined that the cause of death was "mechanical asphyxia," and that death probably resulted from a combination between the strangulation, the gag and the bindings which caused a restriction of the victim's breathing (R 488). The medical examiner testified that an average person could

survive without oxygen for only a few minutes (R 499). However, when asked how long it probably took Millie Worden to die, the medical examiner stated that he really could not make a good guess, but that it probably would not have taken hours (R 501).

Appellant contends that his conviction was made possible only because of Johnny Johnson's testimony, and that Johnson's testimony was inherently incredible.

Appellant ignores the well-settled principle that determining the credibility of witnesses is solely within the province of the jury, and, absent a clear showing of error, its findings will not be disturbed by an appellate court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1982). This principle applies equally to the testimony of a co-perpetrator who has an interest in minimizing his involvement in the crime. See Brown v. State, 526 So.2d 903 (Fla. 1988); Clark v. State, 379 So.2d 97 (Fla. 1980).

Appellant's contention that the evidence is insufficient to support his conviction for kidnapping is also unavailing as the record supports the facts that the victim was forcibly confined against her will, and that the confinement facilitated the commission of the robbery and the theft of her car.

Appellant's convictions must be affirmed.

ISSUE IV

WHETHER THE IMPOSITION OF DEATH IS
APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS
CASE?

Appellant raises several challenges to his sentence of death. The state will address each claim in the order in which they are presented.

Appellant first contends that the instant sentence of death is violative of Enmund v. Florida, 458 U.S. 782 (1982), as the jury's general verdict of "guilty as charged" is insufficient to support a finding that appellant actually killed or intended a killing to result. Appellant's reliance upon Enmund is misplaced.

In Cabana v. Bullock, 474 U.S. 376 (1986), the Supreme Court held that the Constitution does not require a specific finding on the Enmund issue. The Constitution requires only that the "requisite findings are made in an adequate proceeding before some appropriate tribunal, be it an appellate court, a trial judge, or a jury." *Id.* at 392. The Constitutional requirement is satisfied herein because the trial court, acting in its sentencing capacity, found that appellant planned and premeditated the murder (R 1258). Since the record *sub judice* supports this finding, then the Enmund requirement is satisfied. Jackson v. State, 502 So.2d 409 (Fla. 1986), *cert. denied*, 96 L.Ed.2d 686 (1987).

Appellant's second claim is that the trial court improperly found that the aggravating circumstances were proven by clear and convincing evidence rather than beyond a reasonable doubt. Appellant's claim is without merit.

The trial court, in overriding the jury's recommendation of life, correctly noted the standard enunciated by this Court in Tedder v. State, 322 So.2d 908 (Fla. 1975). (R 1246, 1256). The court went on to find that [t]hese five aggravating circumstances are all supported by the evidence and facts in the case. The evidence is so clear and convincing that virtually no reasonable person would differ (R 1248, 1258). Since the trial court utilized the correct standard and language under Tedder, then appellant's semantical argument must fail.

Appellant next challenges the five aggravating circumstances found by the trial court.

His first claim is since the jury, in all likelihood, convicted him on a felony murder theory, then the trial court's finding that the capital felony was committed during the course of a robbery and kidnapping constitutes an impermissible doubling. This Court, citing Lowenfield v. Phelps, 98 L.Ed.2d 568 (1988), rejected this argument in Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988); *see also* Brown v. State, 473 So.2d 1260 (Fla. 1985). Moreover, this Court has repeatedly held that the state may charge premeditated murder and prove the same by introducing evidence of felony murder, and a verdict of felony murder does not constitute a finding that the murder was not also premeditated. Garcia v. State, 492 So.2d 360, 366 (Fla. 1986).

Appellant next claims that the trial court impermissibly doubled two aggravating factors in finding that the murder was committed during the course of a robbery and for pecuniary gain. The state disagrees and contends that a finding of pecuniary gain in aggravation is not error when several felonies, including robbery, have also occurred. Bates v. State, 465 So.2d 490, 492 (Fla. 1985). *See also* Parker v. State, 476 So.2d 134 (Fla. 1985). Moreover, the fact that a trial court engages in a weighing process instead of a counting process negates any claim of prejudicial error especially where the trial court could find separate aggravating factors of pecuniary gain and during the course of a kidnapping.

Appellant next claims that the concealment of the victim's body in the secluded place is insufficient to support the trial court's finding of arrest avoidance. The evidence clearly shows, however, that appellant immediately left the state with the victim's car and belongings after he disposed of the body. The act of concealing the body in a secluded place certainly aided appellant's getaway in light of his knowledge that the victim's daughter could identify him if the body was promptly found.

Appellant's claim that the murder was not heinous, atrocious or cruel is unavailing as this Court has held otherwise in a case involving almost identical facts. *See* Brown, *supra*.

As for the aggravating circumstance that the murder was cold, calculated, and premeditated, the state recognizes that this Court has been reluctant to uphold this factor in cases such

as this; however, the fact that there is evidence indicating that the victim was still alive when appellant ultimately disposed of her evinces a heightened degree of premeditation sufficient to support the trial court's finding.

Appellant's last contention is that the trial court erred in imposing a sentence of death over the jury's recommendation of life. Appellate predicates his claim on the trial court's failure to find evidence in mitigation in light of Doctors Dee and McClain's testimony that appellant was under the influence of extreme mental and emotional disturbance and that his capacity to appreciate the criminality of his conduct was substantially impaired.¹

The state submits that merely because the trial court did not specifically address appellant's evidence and argument does not mean that he failed to consider them. Brown at 1268. This is particularly true here, for Dr. Dee admitted that he never did a follow-up evaluation by consulting family members or by using a CAT Scan, and Dr. McClain testified that his opinion would change if appellant was not intoxicated during the time he killed the victim (R 1111-1114, 1158-1160).

Since the trial court properly found several circumstances in aggravation while finding none in mitigation, then it cannot be said that his imposition of death was erroneous. Brown.

Appellant's sentence must be affirmed.

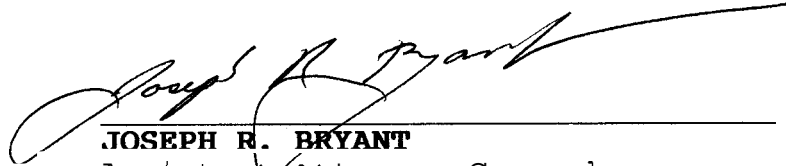
¹ §921.141(6)(b) and (f), Fla. Stat. (1987).

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence of death should be affirmed.

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 Robert L. Doyel, Esquire, Doyel & McKinley, Post Office Box 1476, Bartow, Florida 33830, this 12th day of July, 1989.



OF COUNSEL FOR APPELLEE