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IN THE SUPREME COURT OF FLORIDA

LAWRENCE LEWIS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

_____/

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INITIAL BRIEF OF APPELLANT

Case No: 73,340

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PRELIMINARY STATEMENT

Appellant, Lawrence Francis Lewis, was convicted, after a trial by jury, Honorable Stanton S. Kaplan presiding, of the crimes of Aggravated Assault (F.S. 784.021), Aggravated Battery (F.S. 784.045), Burglary of a Conveyance while Armed (F.S. 810.02), Robbery with a Deadly Weapon (F.S. 812.13), Kidnapping with a Deadly Weapon (F.S. 787.01), and First Degree Murder (F.S. 782.04) (R-3554). Appellant was sentenced to five (5) years imprisonment, fifteen (15) years imprisonment, three (3) terms of life imprisonment and death by electrocution, respectively. All the sentences were imposed consecutive to each other and all consecutive to the death penalty (R-355-4560). The death penalty was imposed after the jury recommended an advisory sentence of death by a ten (10) to two (2) vote (R-3562). The Appellant declined to present any evidence at the advisory sentence proceeding (R-3153-3158).

STATEMENT OF THE FACTS

On May 11, 1987, about 8:00 p.m., Tracy Markum had a party for friends at the trailer she shared with her boyfriend, David Ballard, in Holly Lakes trailer park (R-1582-1584). In addition to Tracy and David and their children, Appellant, Kim Soechtig, Martin Martin, Stacy Johnson, Deon Borst and Chuckie Hedden were all at the party (R-1584). Appellant and most of the other boys drank a lot of beer, and about 10:00 p.m., some of them left the party in Appellant's old blue Jeep to fight with other boys who lived several miles away, in the "Valley" (R-1411, 1421, 1426, 1445, 1586, 1589, 1691-1693).

A fight did erupt in the "Valley" in which Appellant was involved, but when Appellant learned that the police had been called, he fled in his Jeep, leaving the others behind (R-1426, 1447, 1694-1695). They ultimately called Martin Martin who came and picked them up and brought them home to Holly Lakes (R-1449, 1450, 1482, 1697-1698).

Earlier in the afternoon of May llth, James Mayberry, met his friend, Michael Gordon, at a "get-off" house owned by a man named Nose, and together the men used heroin and cocaine repeatedly until 6:30 p.m.. They then set out in Gordon's truck to steal appliances so they could buy more drugs (R-1839-1844, 1849-1852). However, the truck needed gas and had a flat tire, so they had to find a tire to

steal and then make the change, a process which Mayberry said took three hours (R-1853-1860).

As Gordon drove west on Pembroke Road toward Flamingo Road looking for appliances, Mayberry slept, tired not just from the drugs he had taken, but also because he had been out stealing the two previous nights (R-2020, 2033). Mayberry was awakened when the truck bounced all over the road; Gordon told him that someone had thrown a tire in front of the truck (R-1861).

Gordon pulled off the road at an exit of the Raintree Country Club, got out of his truck and started cursing at a Jeep parked 50 feet from the exit that Mayberry described as a new, dark Suzuki Jeep in good condition with a spare on it (R-1861-1862, 2170).

Mayberry thought he saw someone in the Jeep, but stayed in the truck while Gordon cursed and carried on (R-1864). Mayberry then saw someone coming with a metal object behind his back; Mayberry yelled to Gordon to leave. As Gordon turned to walk back to the truck the man walking towards him asked where he was going. Gordon said he was leaving and the man said "not after calling me an asshole you're not." With that, Mayberry said the man swung a pipe at Gordon. Gordon tried to block the blow with his arms but the man hit his arm with the pipe. Gordon ran toward the truck, the man swung the pipe and hit the passenger door. Gordon ran away into the darkness and Mayberry slid over, started the truck and drove away (R-1865). Mayberry could not provide more than a very general description of

this person - a white male, medium build, 5'10" and dark hair - and admitted that he would not be able to identify this man if he saw him again (R-1871, 2040).

Mayberry circled through the country club parking lot onto Hiatus Road and then back to Flamingo Road trying to find Gordon. He finally spotted him by the entrance to the country club and stopped to pick him up. As Gordon climbed into the truck bed from the rear, the man with the pipe reached into the truck opened the door and climbed in (R-1865-1866).

The man told Mayberry to stop the truck; he refused. The man said, "you're going to die tonight." Mayberry said, "We're both going to die then." The man then said, "I'm going to blow your brains out right now", and poked Mayberry with the pipe (R-1867). Mayberry tried to kick the man out of the truck. When that was unsuccessful, Mayberry jumped out of the truck (R-1868).

Although Mayberry swore that he could not identify the man who swung at Gordon in the dark if he saw him again, he nevertheless was allowed to testify that he thought that man was the Appellant. He then identified Appellant as the man in the truck with him (R-1871, 1873-1874, 2040, 2056-2058).

After Mayberry jumped out of the truck, he ran into a dark pasture. He heard the driver of the truck say, "We're going to get your buddy too" and shine the headlights, but the truck passed Mayberry and he ran and hid in a tree in the pasture (R-1870, 1884).

Mayberry said he stayed in the tree for hours and heard Gordon's truck go by four times although he did not see it (R-1885-1886).

Mayberry left the pasture, walked to a road and then on to a shopping center where he said he met a police officer and told him what happened. According to Mayberry, the officer was not interested (R-1888, 1889-1894). Mayberry continued walking and at Flamingo Road he saw an old, blue Jeep that he thought was the same vehicle he had seen earlier on Pembroke Road. Mayberry hid in the bushes and watched the Jeep (R-1889, 1894, 2077-2079).

At about 11:00 p.m. Appellant returned to Holly Lakes. He stopped outside Tracy Markum's house, driving a truck she had never seen before. She walked over to the truck and Appellant asked where David Ballard was. Tracy said she did not know and Appellant asked her to tell Ballard to go to Flamingo Road and fix his Jeep because it was out of gas (R-1589-1590). At that point, Tracy either saw or heard another man in the truck, hurt, on the passenger side floorboard (R-1590). The man said he was in pain and asked Tracy for water. She refused him, saying Appellant told her not to talk to him. Appellant drove off and Tracy went back inside her house (R-1592-1593).

About a half-hour later, Tracy Markum left her trailer to look for David Ballard. She met him coming back home in Martin Martin's truck with the other boys and told him Appellant was looking for him (R-1450, 1486, 1700). Martin turned his truck around and

started back towards his own house when a truck he never saw before passed him. A voice that sounded like Appellant's said "Hey", so Martin stopped his truck and let Ballard, Johnson, Hedden and Borst out. Then Martin drove back home and went to bed (R-1486-1487, 1489, 1700-1701).

After Ballard, Johnson, Hedden and Borst got out of Martin's truck, Appellant got out of the old greenish-white truck he was driving. Appellant took Ballard and Hedden aside and said he'd gotten into a fight and thought he had hurt the guy. Appellant took them to the passenger side of the truck and they saw a man on the floorboard. Appellant grabbed the man's arm and the man yelled. Chuckie Hedden said the man's arm looked broken (R-1702-1704).

Appellant asked Ballard, Johnson and Hedden to go pick up his Jeep for him and then drove away (R-1705). They went to Deon Borst's house and he drove them to Appellant's Jeep near Washington Street on Flamingo Road. However, they could not start the car so they went back to Holly Lakes. Johnson, Borst and Hedden went to their own homes and went to sleep (R-1457, 1471, 1475, 1708-1712, 1762-1767).

Appellant had already returned to Holly Lakes and was at Tracy Markum's trailer. When David Ballard returned, Tracy heard Appellant tell Ballard that he left the man on U.S. 27 and put the truck in a canal. Tracy also heard them mention a broken arm and a jackhammer (R-1598, 1600). Appellant then asked Tracy to get Wendy

Rivera to help get the Jeep, Tracy did so, then went back to sleep while Appellant, Ballard and Wendy went for Appellant's Jeep (R-1601-1602, 1604).

Wendy ultimately drove Appellant and Ballard to Appellant's Jeep on Flamingo Road near Washington Street (R-2239-2244). They put gas in the Jeep and started it. David Ballard, still drunk, started whooping, hollering and then urinated in the road and joked about doing so (R-2247-2249, 2287). Ballard drove off in the Jeep and Appellant left with Wendy in her car (R-2250).

Mayberry, still hiding in the bushes, watched all this (R-1897-1899, 1903-1904). Mayberry then identified the man who whooped, urinated in the road and then drove the Jeep away as looking like the man he saw on Pembroke Road (R-1904). This, of course, was Ballard, not Appellant.

Notwithstanding his identification of Ballard, however, Mayberry did not approach the next police officers he saw with this information. Instead, he ultimately went home and later that day told Gordon's girlfriend what happened and then went back to Nose's "get-off" house to do more drugs (R-1899, 1907, 1909-1912).

Wendy Rivera testified that while Appellant was in her car, he told her that he had killed someone. According to Wendy, Appellant said it was his girlfriend Kim's fault because they were fighting and it raised his temper (R-2251, 2253). Wendy did not believe Appellant, thinking he was trying to impress her (R-2253).

Wendy and Appellant were driving home, following behind David Ballard, who was driving Appellant's Jeep, when Ballard went past the Holly Lakes turn and turned into the median on U.S. 27 south of Griffin Road. Wendy told Appellant that if the body was out here she didn't want to see it. Ballard stopped and he and Appellant were talking when a Suzuki Jeep came south on U.S. 27, hit a burned car on the side of the road and turned over (R-2253-2254).

Appellant, Wendy and Ballard went to help the car's occupants. The two males in the Suzuki Jeep were fine. Appellant helped them push their car into a ditch and David Ballard drove them home to Miami (R-2255, 2256, 2294, 1605). The next day Appellant told Chuckie Hedden that he might have hurt or killed someone the night before (R-1713, 1731, 1735).

The next day, May 12, 1986, the truck registered to Michael Gordon was pulled from the canal at U.S. 27 and Griffin Road. The truck's entire front end, and half of its rear end, were underwater (R-782, 784, 794-796, 810-811, 1061-1062).

On May 13th, Norwood Lancaster was driving home from his job at Broward Correctional Institute when he saw what looked like a tire and a pair of tennis shoes in the median of U.S. 27 south of Griffin Road (R-846-847). He stopped to investigate, and when he walked down into the dip of the median he saw a person who appeared to be dead (R-847-848). He went to a telephone and called the Broward Sheriff's Office, then returned to the body and waited for

the deputy to arrive (R-8848).

Broward Sheriff's deputies arrived to preserve the scene and collect evidence (R-862-870, 878-883, 1078-120, 1161-1175, 1293). The officers found a man's body, subsequently identified as Michael Gordon, in the tall grass in the median. They also found the ratchet section of a jack 3 to 4 feet from his body (R-862-863, 866, 1083). The jack appeared to have blood and hair on it and the grass near the man's head was also blood stained (R-1988, 1092). Notwithstanding extensive testing, no finger prints were lifted from the jack, the blood was not able to be typed, nor were the hairs able to be identified (R-1114, 1124-1125, 1238-1239, 1807, 1818).

Dr. Larry Tate, the Deputy Chief Medical Examiner, examined the body as it lay in the median of U.S. 27 and Griffin Road and then performed the autopsy (R-1294, 1297, 1332). Dr. Tate concluded that Gordon sustained blunt head injuries at that location that caused his death within 12 to 36 hours before Dr. Tate's examination (R-1297-1298), 1306, 1331). Dr. Tate also concluded that Gordon sustained bruises to his face and head, defensive bruises to his hands and a fractured bone injury to his left forearm all while he was alive (R-1335-1336, 1342, 1348-1351, 1374-1375). While these injuries would be painful and could put someone in shock, Dr. Tate also pointed out that his examination showed that Gordon had taken cocaine, opiates, amphetamines and alcohol within 24 to 36 hours of his death, and these drugs could have caused Gordon not to feel pain (R-1369, 1381).

When Gordon's body was found , Detective Gill of the Broward Sheriff's Office learned that a green pick-up had been pulled out of the canal the day before, directly across from where Gordon was found (R-2354-235). Thereafter, on May 14th, Detective Gill interviewed James Mayberry (R-2026, 2150, 2361, 2441).

After a continuing investigation, Detective Gill ordered Appellant's arrest, without a warrant, on May 31st at 3:18 in the morning, as Appellant was leaving work on a dredging site (R-2368-2369, 2386). Appellant was not told what he was being arrested for, although he asked several times while he was being transported to the Sheriff's Office (R-2384-2386, 2415, 249333-24494, 2499). Then, when Appellant was placed in an interrogation room, Detective Gill began to advise him of his rights. Detective Gill told Appellant that he had the right to remain silent and to have an attorney free of charge. When Detective Gill asked Appellant if he understood and if he wanted an attorney, Appellant said he did not need an attorney and asked the detective to tell him what he was being arrested for. When Detective Gill told him he was being arrested for the murder of Michael Gordon, the body found on U.S. 27 and Griffin Road, Appellant said, "That was not a murder, that was more like a fight. I was pissed off." (R-2370-2371). Detective Gill questioned Appellant who refused to make further substantive statements about the case (R-175-176). Detective Gill did not continue reading appellant his Miranda rights (R-178).

POINTS OF LAW INVOLVED

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE OUT-OF-COURT AND IN-COURT IDENTIFICATION TESTIMONY OF JAMES MAYBERRY AS IT' WAS TAINTED BY UNDULY SUGGESTIVE POLICE PROCEDURES.

II.

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF APPELLANT'S IDENTIFICATION EXPERT.

III.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE WHICH BOLSTERED THE CREDIBILITY OF THE EYEWITNESS AND PREJUDICED APPELLANT IN BOTH THE GUILT AND PENALTY PHASES.

IV.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS APPELLANT'S STATEMENTS MADE AS A RESULT OF AN ILLEGAL ARREST.

V.

THE TRIAL COURT'S CHARGE TO THE JURY ON EXCUSABLE HOMICIDE WAS INCOMPLETE AND DEPRIVED APPELLANT OF A FAIR TRIAL.

POINTS OF LAW INVOLVED

VI.

THE COURT'S INSTRUCTION ON REASONABLE DOUBT WAS ERRONEOUS AND DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

VII.

THE CHARGE TO THE JURY IN THE PENALTY PHASE UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT.

VIII.

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WAS ARBITRARY, CRUEL AND UNUSAL, AND A DISPROPORTIONATE PENALTY.

SUMMARY OF ARGUMENT

Appellant maintains that the trial court erred in allowing the identification testimony of the witness, James Mayberry, as that testimony was tainted by suggestive procedures and was so unreliable as to deprive Appellant of due process. Furthermore, it was reversible error for the trial court to exclude Appellant's identification expert, where the trial court found that his testimony was an expert, with scientific testimony, but excluded it nonetheless on the basis that it was within the "general knowledge" of the jury. In addition, the refusal to admit this expert testimony deprived Appellant of substantial mitigating evidence.

Further, the trial court erred in allowing Mayberry to recite a poem he had written which had no relevance to this case but which substantially prejudiced Appellant in both the guilt and penalty phases of the trial.

The trial court erred in refusi g t suppress the statements made by Appellant to the police which were made without full Miranda warnings, and in an attempt by Appellant to find out the reason for his arrest.

The trial court's charge to the jury was so incomplete and erroneous as to deprive Appellant of due process of law. The trial court gave misleading instructions on excusable homicide and reasonable doubt which were undoubtedly confusing to the jury, and,

therefore, deprived Appellant of his right to a fair trial. Furthermore, the charge to the jury in the penalty phase unconstitutionally shifted the burden of proof to Appellant. Where, as here, the Appellant offered no evidence in mitigation, that instruction improperly suggested to the jury that Appellant must come forward with some evidence in order for them to recommend a life sentence rather than death.

Finally, the imposition of the death penalty in this case was disproportionate, arbitrary and cruel and unusual punishment.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE OUT-OF-COURT AND IN-COURT IDENTIFICATION TESTIMONY OF JAMES MAYBERRY AS IT WAS TAINTED BY UNDULY SUGGESTIVE POLICE PROCEDURES.

The trial court erred in allowing into evidence the identification testimony of James Mayberry (R-3496). The evidence established that the out-of-court identification was made several days after the events, after the witness had identified someone other than Appellant, and only after a highly suggestive photo array was shown to the witness in which half of the six photos did not meet the general description provided by the witness. In addition, that photo array was further suggestive in that the photo of Appellant was the only Polaroid type photo, while the others were standard mug shots. In addition, the photo of Appellant was the only one with a pose different from the others and the only one where the subject was photographed without a shirt (R-454-464).

Furthermore, the in-court identification should have been suppressed since there was a substantial likelihood that the suggestive photo array, and subsequent suggestive contacts between the witness and Appellant, resulted in a misidentification in this case. The witness picked out the one unusual photo in the array and thereby identified Appellant; thereafter on hearing and trial dates

for this case, the witness and Appellant were placed in the same holding cell, where the witness was given the opportunity to hear Appellant called by name and see him respond to his name (R-464, 473).

In this case, unduly suggestive procedures fatally tainted the identification and deprived Appellant of due process. Under the rule of Stovall v. Denno, 388 U.S. 293 (1967), the identification testimony should have been suppressed. Appellant maintains that the Stovall standard is the appropriate standard to be applied in this capital case, since Stovall, alone among the United States Supreme Court identification cases, was a capital case. As that Court has noted, more reliability in decision making is required in capital cases than in non-capital cases. Johnson v. Mississippi, ___ U.S. ____, 108 S.Ct. 1981, 1986 (1988). That being so, the non-capital cases of Neil v. Biggers, 409 **U.S.** 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977), to the extent they set forth a more relaxed standard than that set out in Stovall, ought not to be seen as controlling authority in capital cases.

However, even if the "totality of circumstances" standard of Manson is viewed as applicable in this capital case, under that standard, the out-of-court and in-court identification testimony of Mayberry should have been suppressed. Edwards v. State, 538 So.2d 440 (Fla. 1989). The totality of the circumstances in this case shows that:

1). Mayberry had been using drugs that day as well as for years before and in the days after, including immediately before giving his statement to the police;

2). Mayberry was awakened from sleep and saw a figure in the darkness that he admitted he could not identify, and saw another figure in a Jeep nearby;

3). Mayberry drove away from the figure in the darkness; when he returned shortly he merely assumed the man who climbed in the truck with him was the same man who had hit Gordon;

4). The man in the truck with Mayberry was seated near him, but the truck was dark, Mayberry was driving, and he was terrified for the minute or two that they were in the truck together. Therefore, Mayberry did not have sufficient opportunity to see and observe the man in order to make a valid, reliable identification (R-1874).

5). Shortly after Mayberry ran away, he had an opportunity to observe Appellant and David Ballard on a well lit street. Mayberry identified Ballard as looking like the man in the truck with him just a few hours earlier. Mayberry did not identify Appellant at all.

In short, as in Edwards, supra, none of the criteria for finding a reliable, untainted identification were present in this case.

The United States Supreme Court has never wavered from its

position that "...the identification of strangers is proverbially untrustworthy" United States v. Wade, 388 U.S. 218, 228 (1967) and that a "... witness's recollection of the stranger can be distorted easily by the circumstances or by later actions of the police." Manson v. Brathwaite, 432 U.S. 98, 112 (1977). Nor has this Court strayed from its requirement that where unconstitutionally suggestive pre-trial identification procedures taint the in-court identification, as in this case, due process requires the State to prove that Mayberry's identification rested on his independent observations at the time of the crime. cf., White v. State, 403 So.2d 331, 335 (Fla, 1981); Bundy v. State, 45 So.2d 330, 343-344 (Fla. 1984); Holsworth v. State, 522 So. d 348, 352 (Fla. 1988).

The State did not meet its burden in this case. The trial court should have suppressed the identification testimony.

POINT II

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF APPELLANT'S IDENTIFICATION EXPERT.

Appellant proffered the testimony of Dr. Martin Blinder, a psychiatrist with extensive legal and medical experience in the eyewitness identification process (R-1858-1964). Dr. Blinder would have testified about how people perceive, retain and retrieve information and what factors influence those memory processes, including the debilitating effects on memory of drug use over a long time (R-1966-1981, 1989). In addition, the witness would have testified to empirical studies that have shown that juries tend to have an extraordinary bias in favor of eyewitness testimony disproportionate to the actual reliability of any eyewitness (R-1993-1995).

The trial court refused to admit Dr. Blinder's testimony, saying in part:

> "I think that certainly what the doctor testified to does have scientific basis but I think that that scientific basis is also within the special knowledge and normal experience of a competent citizen, who we hope that is what we have on this jury. I think that in this particular case there is substantial corroboration of what Mr. Mayberry indicates and of the defendant's participation. (R-2012)

In support of its ruling, the trial court cited Johnson v.

State, 393 So.2d 1069 (Fla. 1980), which held that a trial court had not abused its discretion in excluding an eyewitness fallibility expert. However, on the facts of the instant case, that exclusion was indeed an abuse of discretion.

In the instant case, the eyewitness identification was highly suspect, as noted supra in Point I. Here, the identification testimony was the result of an inadequate opportunity for observation by a witness who may have been rendered incompetent to make sound observations by his prolonged drug use, and who was exposed to unduly suggestive identification procedures. Since the identification testimony was both critical to the case and suspect, expert testimony on the scientific basis of how people remember was essential to this jury. Without Dr. Blinder's testimony, the jury was deprived of a scientific framework for weighing the capacity of a witness' memory, See Brigham, Disputed Eyewitness Identifications: Can Experts Help? The Champion, June, 1989, 10, 16.

In fact, the trial judge ruled this was expert, scientific testimony; he excluded it anyway on the baseless and conflicting supposition that it was scientific testimony within the "special knowledge" and also the "normal experience" of the jury. Clearly, a jury uninformed by an expert of the scientific nature of evidence cannot possibly have that scientific basis within its "special knowledge." Nor can scientific "special knowledge" be within the "normal experience" of all jurors. See, State v. Chapple, 135 Ariz.

281, 660 P.2d 1208 (1983).

Further, under this Court's recent decision in Edwards v. State, ____ So. 2d ____, 14 F.L.W. 441 (Fla. Sept. 8, 1989), this evidence was erroneously excluded. In Edwards, this Court decided that evidence of past drug use could be introduced for the purpose of impeachment if "... it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember and recount". 14 FLW 442. Under this Court's criteria in Edwards, Dr. Blinder's proffered testimony was certainly relevant evidence that drug abuse on the scale of Mayberry's would affect his ability to observe, remember and recount.

Finally, by excluding this relevant evidence, the trial court effectively deprived Appellant of the full extent of the mitigating factor of lingering doubt. Appellant did not present any evidence at the penalty phase. Had Dr. Blinder's proffered testimony been admitted on the guilt phase, the jury would have had the necessary frame of reference to interpret and evaluate the eyewitness evidence, The suspect nature of the identification testimony may have caused a fully informed jury to exercise mercy on the ground of a lingering doubt.

The failure to admit the relevant expert testimony of Dr. Blinder deprived Appellant of a fair trial on the issues of guilt and punishment. Therefore, Appellant **is** entitled to a new trial and sentence proceeding.

POINT 111.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE WHICH BOLSTERED THE CREDIBILITY OF THE EYEWITNESS AND PREJUDICED APPELLANT IN BOTH THE GUILT AND PENALTY PHASES.

After the eyewitness, James Mayberry, testified on direct and cross examination, the trial prosecutor asked him, on re-direct examination, to read to the jury a poem he had written while in jail regarding his life and drug abuse (R-2160). Over Appellant's objection (R-2160, 2163) that this poem was irrelevant since the witness was not presently on drugs, the State argued:

> "...Mr. Kirsch has listed Doctor Blinder as an expert witness on how drugs affect a person's ability to recall and remember. And the degenerative effects it has on a person's mind.
> I certainly think this is relevant because I think Mr. Kirsch is going to -- in closing argument, I anticipate, certainly anticipate, what he's going to do. I think if I was Mr. Kirsch I would make Mr. Mayberry's mind into a sponge." (R-2163-2164).

When Appellant objected, saying the poem was irrelevant, prejudicial and calculated only to engender sympathy for Mayberry and enhance his credibility, the trial court nevertheless ruled it admissible saying:

> THE COURT: I think his memory is certainly an issue, whether he was intoxicated with drugs at the time or not.
>
> MR. KIRSCH: This has nothing to do with what

his capacity was at that time.

THE COURT: I think it shows his ability to recall and memorize. I think that's something the jury ought to hear. I'll deny the motion. (R-2164-2165).

This was error. To be admissible, evidence must be relevant to some issue in the case. F.S. 90,402. This poem was not relevant to any issue - certainly, not to the issue of Mayberry's capacity to perceive at the time of the crime: nor does this poem relate in any way to Mayberry's capacity to retain or recall information. In fact, the poem is nothing more than a self-serving apologia calculated to improperly convince the jury that a witness who could write such a poem is more worthy of belief than a witness who, while sleepy and under the influence of drugs, had a brief view of someone under dark and frightening conditions.

Furthermore, the sole basis which the State advanced at trial for the admission of this poem was that it was intended to rebut the testimony which the State anticipated would be presented on Appellant's behalf by the eyewitness fallibility expert, Dr. Blinder (R-2163). Since the trial court refused to allow Dr. Blinder's testimony, it was error to allow the State to anticipatorily rebut that same excluded testimony.

By allowing the witness to read this poem about his addiction and prison life, the State was improperly bolstering the credibility of Mayberry. In effect, Mayberry's recital said to the

jury:

> "You can believe me because I'm not just your average heroin addict who's memory and intellect have been dulled by a lifetime of drug abuse: I'm still a thoughtful, believable person."

Just as it is improper to allow inquires relative to a witness's general moral character, Chavers v. State, 380 So.2d 1180 (Fla. 5th DCA 1980), so, to, is it improper to allow irrelevant, self-serving statements by witnesses to enhance their own believability, Allowing Mayberry to bolster his credibility by reading his jailhouse poetry deprived Appellant of a fair trial and due process of law.

In addition, this error did not just prejudice Appellant's right to a fair trial, it also improperly affected the penalty phase of this trial. This poem had the effect of engendering sympathy for Mayberry and enhancing any estimation of his human worthiness and credibility. It cannot be said that this poem and its resultant sympathetic enhancement of a victim-witness did not improperly sway the jury to recommend death rather than life. As such, it **would** be inadmissible, much as improperly admitted Williams rule evidence would be. See, Castro v. State, 14 FLW 359 (Fla. July 21, 1989).

This irrelevant evidence prejudiced Appellant's right to a fair trial and to a fair penalty hearing restricted to only those aggravating circumstances applicable to the facts and proved beyond a

reasonable doubt. Therefore, Appellant's conviction and sentence must be reversed.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS APPELLANT'S STATEMENTS MADE AS A RESULT OF AN ILLEGAL ARREST.

The homicide that is the subject of this case occurred on May 11, 1987. The Broward Sheriff's Office conducted an investigation and, on May 31, 1987, at 3:00 a.m., Appellant was arrested without a warrant (R-49). Appellant was arrested on a dark dirt road leading to a drag line operation where he had just finished working. The arrest was accomplished by at least four officers, a K-9 marked unit and a helicopter unit (R-49, 56-57). The trial court found that even if Appellant was then told that he was under arrest, he was not then informed of the reason for that arrest (R-3421-3422, see 196, 166).

Instead, Appellant was transported downtown, all the while asking the transporting officer what he was under arrest for and getting no answer (R-237).

Then, twenty minutes later, when Appellant was handcuffed in the interrogation room, Detective Gill began to read him his Miranda rights. As soon as Detective Gill told Appellant that he had a right to an attorney, Appellant said "I don't need an attorney, tell me what I'm being arrested for." Detective Gill stopped the Miranda warnings then, and said he was being arrested for the murder of Michael Gordon, out on U.S. 27. At that point, Appellant said

that wasn't a murder, it was more like a fight, that he (Appellant) had gotten pissed off (R-54, 72-73, 173-175).

Detective Gill continued questioning Appellant who refused to say anymore because, he said, he'd been "down that road before", had talked to the police and it had hurt him (R-54, 73-74). Detective Gill never completed the Miranda warnings (R-178).

The trial court erred in refusing to suppress Appellant's statement that this was not a "murder but just a fight". While ordinarily the failure to give Miranda warnings will not necessarily render a spontaneous statement inadmissible, in this case, this statement was elicited only as a direct result of the unlawful failure of the police to properly advise Appellant of the reason for his arrest at the time of his arrest.

Florida Statute 901.17 provides that a police officer shall inform the person to be arrested of the cause of the arrest, except under circumstances not present in this case. Nevertheless, the police here failed to advise Appellant of the reason for his arrest until he was already in an adversarial, coercive interrogation situation. It was 3:30 in the morning, Appellant had been driving for twenty minutes, repeatedly trying to find out why he was being arrested without gaining any information. In short, Appellant had no opportunity to learn in a timely fashion why he was being arrested in the middle of night. The facts surrounding this warrantless arrest were inherently coercive; thus, the statements of Appellant seeking

only to learn the information that the police were required by law to give him prior to "Mirandizing", and interrogation should have been suppressed.

The coercive nature of this arrest and interrogation is further demonstrated by the failure of the police to obtain a warrant for Appellant's early morning, back road arrest. Of course, an arrest without a warrant may be lawful when a felony has been committed and an officer reasonably believes the arrestee committed it. Fla. Statute §901.15 (1988). However, where, as here, more than two weeks elapsed between the incident and an arrest, the surrounding circumstances of the warrantless arrest must nevertheless be examined as to their coerciveness.

Here, Detective Gill testified that he had no opportunity to get a warrant because both Appellant and David Ballard were suspects until nine p.m. to midnight on May 30th, when David Ballard gave Detective Gill a statement incriminating Appellant and exculpating himself (R-160-163). Detective Gill released Ballard before seeking an arrest warrant, even though Detective Gill knew that Ballard and Appellant were neighbors and Ballard might tell Appellant that the police were looking for him. In short, Detective Gill released Ballard and then justified the middle-of-the-night helicopter arrest of Appellant by saying that he feared Appellant would flee if he waited to get an arrest warrant (R-160-1631, a situation created by design, of the Agent of the State.

In sum, the statement that Appellant sought to suppress was the direct product of a set of inherently coercive circumstances: a three a.m., warrantless arrest on a dark back road where Appellant had just completed a night's work and where Appellant was not advised of the cause of his arrest. On the specific facts of this case, it was error for the trial court to deny Appellant's motion to suppress any statements made as a direct result of police failure to advise him of the cause of his arrest, together with evidence of inherently coercive circumstances which further exacerbate the involuntariness of the alleged admissions.

POINT V

THE TRIAL COURT'S CHARGE TO THE JURY ON EXCUSABLE HOMICIDE WAS INCOMPLETE AND DEPRIVED APPELLANT OF A FAIR TRIAL.

The trial court instructed the jury on excusable homicide as follows:

The killing of a human being is excusable, and therefore lawful when:

1). committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or

2). by accident or misfortune in the heat of passion, upon any sudden an sufficient provocation, or

3). upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner (R-2739-2745).

This instruction was given in virtually identical form in Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989); Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988); Bowers v. State, 500 So.2d 290 (Fla. 3rd DCA 1986); and Blitch v. State, 427 So.2d 785 (Fla. 2nd DCA 1983). In every one of those cases, this instruction was disapproved of as confusing and misleading to the jury.

Similarly, in the instant case it was error for the trial court to give this instruction because it could have confused and misled the jury. See Butler v. State, 493 So.2d 451 (Fla. 1986).

There was evidence in this case from which the jury could have concluded that Michael Gordon's cursing, ranting and raving constituted sudden and sufficient provocation making this a heat of passion excusable homicide. However, the jury would undoubtedly and erroneously have concluded that the use of a dangerous weapon could never permit a killing to be excusable.

Because of the confusing, misleading jury instruction, Appellant was wrongfully deprived of his right to have his fate determined by a jury that was fully, fairly and completely instructed. Therefore, Appellant is entitled to a new trial before a jury that will be fairly and correctly charged.

POINT VI

THE TRIAL COURT'S INSTRUCTION ON REASONABLE DOUBT WAS ERRONEOUS AND DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

The trial court instructed the jury, in part, that "...if you have a reasonable doubt, you should find the defendant not guilty." (R-2991)(Emphasis added). It is well settled that a court's instructions to a jury on reasonable doubt are critical and fundamental to the protection of Appellant's right to a fair trial and due process of law. As the United States Supreme Court said in United States v. Martin Linen Supply Co., 430 U.S. 564 (1976), a jury's:

> "... overriding responsibility is to stand between the accused and a potentially arbitrary or abusive government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict (citations omitted), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused. 430 U.S. at 572-573.

For a jury to fulfill its recognized responsibility, it must be careful and correctly instructed by the trial court. The trial court, by its instructions, may not interfere with the jury's

judgment to the detriment of an accused. And yet, that is exactly what the court's instruction on reasonable doubt may have accomplished in this case.

Before examining the court's charge in this case, we must look to the standard jury instruction promulgated by the Florida Supreme Court on reasonable doubt, Florida Standard Jury Instructions In Criminal Cases, 1981 edition, p.13. That instruction, 2.03, explains:

> "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilty. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable." (emphasis added).

The emphasized word is critical; when a juror has a reasonable doubt, the juror has no choice, but is mandated to find the defendant not guilty. Only when a juror has no reasonable doubt as to a defendant's guilt is the juror nevertheless given a choice. Then, and only then, is the juror told he should find the defendant guilty. Should, in its ordinary meaning, means that the juror ought to find the defendant guilty, but the juror may do otherwise. But,

when the juror has a reasonable doubt, the constitutional presumption of innocence permits no choice. The defendant, presumed innocent, must be found not guilty.

Nevertheless, that same instruction concludes by advising the jury that, "if you have a reasonable doubt, you should find the defendant not guilty." Florida Standard Jury Instructions In Criminal Cases, 1981 edition, p.13 (emphasis added). Appellant maintains that this instruction is erroneous and highly prejudicial.

Few cases have specifically considered the propriety of an instruction that a jury "should" find a defendant not guilty if it has a reasonable doubt. In Gilmore V. Curry, 523 F.Supp. 1205, 1208 n.5 (S.D.N.Y. 1981), the Court noted that a virtually identical charge was not correct, but was harmless error as it appeared only once in a supplemental charge. However, in Thomas V. State, 494 So.2d 240 (Fla.App. 4th DCA 1986), the Fourth District Court of Appeal, when faced with another issue, has occasion to examine and quote with approval the reasonable doubt charge actually given by that trial court. That charge exactly tracked the language of the standard charge, with only one modification. In giving the concluding paragraph of the standard instruction, the trial court changed the "should" to "must" saying: "if you have a reasonable doubt, you must find the defendant not guilty. However, if you have no reasonable doubt, you should find the defendant guilty. 494 So.2d at 247 (emphasis added).

Due process of law requires that the prosecution prove all the elements of its case beyond a reasonable doubt. In Re: Winship, 397 **U.S.** 358 (1970). A trial court's instruction must not suggest to the jury that it may convict the defendant even though they have a reasonable doubt. Gerds v. Sate, 64 So.2d 915 (Fla. 1953); Sandstrom v. Montana, 442 **U.S.** 510 (1979).

The trial court's charge in this case, when viewed as a whole, did not fairly and accurately state the law of reasonable doubt. In its charge here, the trial court admittedly first told the jurors that if they had a reasonable doubt they must find the Appellant not guilty. But, immediately after that the jury was instructed differently. The last words this jury heard o the subject of reasonable doubt were, "if you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty (R-2991). (emphasis added).

It is impossible to say that this improper characterization of the presumption of innocence and reasonable doubt did not result in this jury rendering a guilty verdict even though it did not find that the charge was proved beyond every reasonable doubt.

It is true that Appellant's trial counsel did not object not the court's erroneous instruction. However, this Court may nevertheless review and correct the error. It is well settled that fundamental errors will be recognized even if no objection was made at trial. Jones v. State, 484 So.2d 577 (Fla. 1986); Leary v. State,

406 So.2d 1222 (Fla.App. 4th DCA 1981). There is nothing more fundamental to our system than that all defendants are presumed innocent beyond a reasonable doubt. Winship, supra. That most elemental prosecution is lost if jurors are misled by the court's instructions into thinking that they have the choice of convicting a defendant even if guilt is not proven beyond a reasonable doubt. The trial court, by instructing the jury that they should find the defendant not guilty if they had a reasonable doubt, improperly gave this jury that choice.

POINT VII.

THE CHARGE TO THE JURY IN THE PENALTY PHASE UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT.

At the penalty phase, the trial court instructed the jury:

> Now should you find sufficient aggravating circumstances do exist it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (R-3192)

And further that:

> Now each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.
>
> If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> Now mitigating circumstances need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established (R-3193-3194).

This charge, when read in its entirety, unfairly and unconstitutionally shifted the burden of proof from the State to the appellant and deprived Appellant of due process of law. Mullaney V. Wilbur, 421 **U.S.** 684 (1975).

By charging the jury that they must find that mitigating

circumstances outweigh aggravating circumstances, before recommending life imprisonment, the trial court improperly suggested that Appellant had some burden of going forward and producing some evidence at the penalty hearing. Under this instruction the jury may have been misled into thinking that if the State established any aggravating circumstances that the burden then shifted to Appellant to produce evidence at the penalty hearing of mitigating circumstances, before they could recommend life imprisonment. Thus, the jury could have been confused by the instructions in this case into thinking that if Appellant did not meet his burden of coming forward with new evidence at the penalty hearing and persuading the jury that such new evidence was mitigating, that no balancing needed to be done. In short, this instruction, on the facts of this case, does unfairly and improperly suggest that Appellant must come forward and offer mitigating evidence in rebuttal in order to trigger the protection of the reasonable doubt standard. See Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982).

This burden shifting is improper and deprived Appellant of due process of law. Mullaney, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973), cert denied 416 U.S. 943 (1974); see also, Arango v. State, 411 So.2d 172 (Fla. 1982); cert denied 457 U.S. 1140, death sentence vacated 467 So.2d 692, cert granted and vacated 474 U.S. 806, rehearing denied 474 U.S. 1015, on remand 497 So.2d 1161; State v. Cohen, 545 So.2d 894 (Fla. 4th DCA 1989). Therefore, Appellant is

entitled to a reversal of his sentence and to a new penalty proceeding with a properly instructed jury.

POINT VIII

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WAS ARBITRARY, CRUEL AND UNUSUAL, AND A DISPROPORTIONATE PENALTY.

The trial court erred in finding three aggravating circumstances and nonmitigating circumstances, and in imposing the death penalty. This Court has, of course, repeatedly held that death is different from all other penalties and may not be imposed arbitrarily or disproportionately.

In the instant case, there was evidence at trial which established the existence of mitigating factors: that Appellant acted under the influence of emotional distress brought on by a turbulent relationship with his girlfriend (R-2251, 2253); that Appellant was substantially impaired having been drinking all evening (R-1411, 1421, 1426, 1445, 1586, 1589, 1691-1693); and that Appellant was a young man in his early twenties, gainfully employed. In light of this evidence, it was error for the trial court to find that no mitigating factors were established (R-3226-3229).

Since there were mitigating factors, death was not the appropriate or proportional penalty in this case. Although the jury did recommend death in this case, that factor cannot conclusively establish proportionality. In fact, in several recent cases where the jury has recommended death, this Court has reversed that sentence. Bello v. State, 14 F.L.W. 339 (Fla. July 6, 1989)

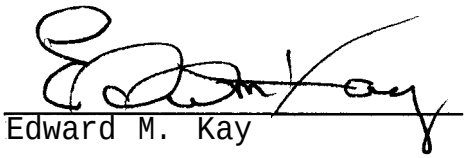
(appellant killed one undercover police officers and injured two other people in a drug deal gone sour); Songer v. State, 14 F.L.W. 262 (Fla. June 2, 1989) (appellant escaped from prison and executed a Florida Highway Patrol officer to avoid capture).

Similiarly, in the instant case, the imposition of the death penalty is extreme and disproportionate in the light of the mitigating evidence which appears in the record of trial.

CONCLUSION

Based on the foregoing, the judgment of conviction and sentence of death should be REVERSED and a new trial and penalty proceeding GRANTED.

Respectfully submitted,



Edward M. Kay