IN THE SUPREME COURT OF FLORIDA

JEFFREY ATWATER,
Appellant/Cross-Appellee,
vs.
STATE OF FLORIDA,
Appellee/Cross-Appellant.

Case No. 76,327

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I

THE STATE'S EVIDENCE FAILED TO REBUT THE REASONABLE HYPOTHESES OF INNOCENCE THAT (1) THE THEFT IF ANY WAS AN AFTERTHOUGHT AND (2) SMITH DID NOT HAVE MONEY IN HIS POCKET.

The State argues that a judgment of acquittal should seldom be entered for failure to prove intent. Brief of Appellee at 5. The abstract merits of this assertion, if any, are irrelevant because this case is one of those for which a judgment of acquittal should be entered.

Intent, like any other element of a crime, must be proved beyond a reasonable doubt. Contrary to Appellee's view, the evidentiary principles of State v. Law, 559 So. 2d 187 (Fla. 1989), apply to all elements of a crime and not merely to those elements that are easy to prove. If the defendant can reasonably hypothesize that he lacked the requisite evil mens rea, then the State must present evidence inconsistent with this hypothesis to avoid an entry of acquittal. Id. This Court has often found a failure to prove intent because the State failed to present such evidence. See, e.g., Jackson v. State, 575 So.2d 181, 186 (Fla. 1991) ("There is no evidence of a fully-formed purpose to kill"); accord Rager v. State, 587 So. 2d 1366, 1370 (Fla. 2d DCA 1991) ("Intent may be shown by circumstantial evidence, but if proof rests solely on circumstantial evidence, the proof must be not only consistent with the guilt of the accused, but also inconsistent with any other

reasonable hypothesis of innocence"); Valdez v. State, 504 So. 2d 9 (Fla. 2d DCA 1986).

Furthermore, Appellant cited in his initial brief several of this Court's cases on the pecuniary gain aggravating circumstance which were indistinguishable from the present case. These cases uniformly held that an intent for pecuniary gain was not proved because the taking could have been an afterthought. This was precisely Appellant's hypothesis of innocence in this case. The State presented no evidence inconsistent with this hypothesis. If the evidence of intent in the pecuniary gain cases did not sufficiently establish that aggravating factor, then the evidence in the present case of an intent to rob was similarly insufficient, because the facts in the pecuniary gain cases were substantially similar and the same theoretical analysis applies to the sufficiency of the evidence for crimes and for aggravating circumstances. See Eutzy v. State, 458 So. 2d 755 (Fla. 1984).

On this issue, Appellant also now relies on Harris v. State, 589 So. 2d 1006 (Fla. 4th DCA 1991). In Harris, the victim of a sexual assault in her bedroom discovered that money had been taken afterward from her purse in the living room. The court found that robbery was not proved because the taking was not necessarily linked to the force used in the sexual battery.

> To distinguish the offense of robbery from the offense of theft, force or threat must be used in an effort to obtain or retain the victim's property. Cf. State v. Baker, 540 So. 2d 847 (Fla. 3d DCA 1989). Where the victim, at the time, is not even aware of the taking, it is not a taking by force or putting in fear. See

S.W. v. State, 513 So.2d 1088 (Fla. 3d DCA 1987).

Id. at 1007.

ISSUE II

BECAUSE ROBBERY WAS NOT PROVED, ATWATER DID NOT RECEIVE A TRIAL BY JURY ON PREMEDITATED MURDER, AND INSTRUCTING THE JURY ON FELONY MURDER WAS HARMFUL ERROR.

Appellant disagrees that this issue is not preserved. Because the trial court denied the motion for judgment of acquittal on the robbery charge, objecting to the instruction on felony murder was obviously pointless. Counsel was not required to pursue a futile course of action and in fact had an ethical duty not to do so. Moreover, unlike trial counsel in Bertolotti v. Dugger, 514 So. 2d 1095 (Fla. 1987), counsel below did object to the sufficiency of the evidence for robbery.

For several reasons, Griffin v. United States, 116 L. Ed. 2d 371 (1991), is not controlling here. First, Griffin applies only to federal law and does not control this Court's interpretation of Florida law and the Florida constitution.

Second, Griffin addressed only a Fourteenth Amendment claim and expressly did not consider a Sixth Amendment claim that the petitioner in Griffin did not receive a proper jury trial. Appellant here expressly asserts his Sixth Amendment rights and in particular asserts that the Sixth Amendment encompasses the right to have a unanimous (or at least nearly unanimous) jury agreement on a valid and legally sufficient theory of guilt.

In this case, the State cannot say beyond a reasonable doubt that the jury's decision was not based in part on an invalid theory of guilt. The State cannot say that the jury even considered the premeditation form of first degree murder. It is entirely plausible (and even likely) that the jury convicted only on felony murder and never reached the question of premeditation. It is even possible that the jury unanimously rejected the premeditation theory. It would be Kafkaesque and a violation of due process to affirm a death sentence based on a theory which the jury unanimously rejected. Accordingly, Atwater's Sixth Amendment rights as well as his Fourteenth Amendment rights were violated, because he may not have received a jury decision on a valid theory of guilt.

Third and most importantly, the real basis of Griffin is its assumption that jurors will not convict on insufficient evidence.

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance -- remote it seems to us -- that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

116 L. Ed. 2d at 383, quoting United States v. Townsend, 924 F.2d 1385, 1414 (7th Cir. 1991).

Griffin's assumption that juries will not convict on insufficient evidence is probably incorrect even in the federal courts, notwithstanding the liberal standards which federal courts apply to sufficiency issues. See Fowler v. State, 492 So. 2d 1344, 1347 n.3 (Fla. 1st DCA 1986) (rejecting liberal federal sufficiency standard that jury may choose among several reasonable constructions of the

evidence). It certainly is incorrect in Florida courts, as the multitude of cases which have reversed for insufficient evidence demonstrates. Finally, if this Court agrees that the evidence failed to prove robbery in this case, then the assumption is patently incorrect in the present case because the jury in fact convicted the Appellant of robbery.

This conviction for robbery is the key distinction between this case and Griffin. In this case unlike Griffin, we know that the jury convicted on an invalid theory of guilt for robbery. This invalid theory surely affected the deliberations for capital murder. This Court cannot say that the invalid felony murder theory did not affect the deliberations because the jury may never have reached the alternative premeditation theory and may even have unanimously rejected it.

Finally, because a death sentence was imposed in this case, a greater degree of certainty is required under the federal and state constitutions. Even if Griffin is correct for most cases, it cannot properly apply to capital cases. Appellant continues to rely on Mills v. Maryland, 486 U.S. 367, 377 (1988) (citation omitted).

> In reviewing death sentences, the Court has demanded even greater certainty that the jury's decisions rested on proper grounds. See, e.g., Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

ISSUE III

EXCLUDING THE SOLE BLACK JUROR IN THE VENIRE WAS ERROR BECAUSE THE RECORD DID NOT SUPPORT THE CONCLUSION THAT SHE DID NOT WANT TO SERVE ON THE JURY, AND OTHER JURORS WITH RESPONSES SIMILAR TO HERS WERE ALLOWED TO SERVE.

The State asserts that this issue is procedurally barred, in part because the defense never said that the reason offered by the prosecutor was equally applicable to unchallenged white jurors. The State cites Floyd v. State, 569 So. 2d 1225 (Fla. 1990), but this case holds only that the defense must object to factual misstatements by the prosecutor. Underlying Floyd is the fact that a prosecutor's confusion about which juror said what is itself a reason to believe that discrimination did not occur.

Appellant knows of no case holding that the defense must also point out that the prosecutor's reasons apply to unchallenged white jurors. In fact, many cases have reversed on this exact issue, and none indicated that the defense preserved it to the extent now advocated by the State. See, e.g., Roundtree v. State, 546 So. 2d 1042 (Fla. 1989); Gadson v. State, 561 So. 2d 1316 (Fla. 4th DCA 1990). To the contrary, after the defense properly objects and makes a prima facie case of discrimination, the burden shifts to the State to rebut it. The defense has carried its burden at that point. In addition, State v. Slappy, 522 So. 2d 18 (Fla. 1988), places an affirmative duty on the trial judge to determine whether the reasons given are neutral and reasonable and not a pretext.

In this case, the defense objected to the prosecutor's reason, reiterated that Ms. Ellison was challenged because she was the only black person on the panel, and moved for a mistrial after the court accepted the challenge as valid. (R852) This objection was sufficient, and requiring still further objections from the defense would place an unreasonable burden on defense lawyers. It would also eviscerate the protections provided by Batson v. Kentucky, 476 U.S. 79 (1985), and State v. Neil, 457 So.2d 481 (Fla. 1984), because it would fail to safeguard the broad purpose of Batson and Neil to prevent discrimination. This Court should not allow discrimination against black jurors to go unchecked when the defense has in fact objected and made a prima facie case that discrimination occurred.

ISSUE IV

FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL JUDGE TOLD THE JURY THAT HE COULD NOT ANSWER ANY JURY QUESTIONS ABOUT THE LAW OR PROVIDE ADDITIONAL INSTRUCTIONS.

The State's citation of Colbert v. State, 569 So. 2d 433 (Fla. 1990), is not at all on point. In Colbert, defense counsel in fact participated in the discussion of the jury's request. In the present case, he did not. The State's reliance on Mills v. State, 17 F.L.W. D798 (Fla. 4th DCA Mar. 25, 1992), is equally misplaced. Mills found conflict with Cherry v. State, 572 So. 2d 521 (Fla. 1st DCA 1990) -- as well as this Court's own decisions -- and applied

harmless error principles. This Court should disapprove Mills because it is contrary to its own well-settled law.

In any event, as Appellant argued in his initial brief, even if Mills is correct that the error can be harmless, the error cannot be shown to be harmless in this case. The juror was never in fact allowed to ask his question, and we do not know what other questions the jury might have asked.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING EVIDENCE OF THE DEFENDANT'S LACK OF REMORSE AND BY REFERRING TO IT REPEATEDLY IN THE SENTENCING ORDER.

The State contends that the defense failed to preserve an objection to evidence of lack of remorse. Appellant disagrees because he plainly objected to this evidence. If the trial judge did not understand the objection, he should have asked for clarification before he overruled it.

In any event, to the extent that the sentencing order was influenced by the Appellant's alleged lack of remorse, fundamental error occurred. In sentencing guidelines cases, erroneous written orders are considered fundamental error if the sentencing error is apparent from the face of the record. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986). The instant sentencing error was apparent from the face of the record. Employing a strict contemporaneous objection rule for erroneous written reasons that justify electrocution in the electric chair would be highly anomalous if this

Court at the same time used a substantially relaxed rule for erroneous written reasons that merely justify departure from the sentencing guidelines.

ISSUE VI

THE COURT IMPROPERLY LIMITED THE DEFENSE PRESENTATION OF EVIDENCE IN THE PENALTY PHASE BY NOT ALLOWING DEFENSE COUNSEL TO QUESTION THE WITNESS ABOUT HIS DEPOSITION STATEMENT THAT PRESSURE WAS BUILDING UP.

Appellee claims that Appellant's initial brief failed to address the trial court's ruling that the courtroom testimony did not contradict the deposition statement. This claim is false. As Appellant said in his initial brief, Painter's courtroom testimony was as follows:

> Q: [D]idn't you sense that these relationships were starting to boil? . . .
>
> A: Oh no. There was -- you know, they got along good just like they always did. You know, just the little spats between Kenny and Adele.
>
> Q: I mean between everybody, the whole group of them.
>
> A: Always about the same thing. . . . I couldn't tell any different. . . .
>
> Q: You never saw like a pot of water steaming up, so to speak, within the family?
>
> A: To imagine this to happen? No sir.

(R1620-21) As Appellant also pointed out in his initial brief, Painter said in his deposition that "I knew there was pressure building up, I just didn't know how serious it was." (R179-80)

Appellant does not know how he could have said more clearly that these trial and deposition statements were contradictory.

The State now illogically attempts to rely on Painter's testimony at trial to explain away these contradictory statements. This attempt is unavailing, because the consistency of Painter's deposition with his trial testimony does not somehow make his contradictory penalty phase testimony more consistent. Moreover, Painter testified at trial that Atwater had become angry with Kenny Smith. (R1326) This trial testimony was different from the deposition statement that pressure was building up. Consequently, Painter's trial testimony has no bearing on the inconsistent statements he made during the penalty phase.

ISSUE VII

THE COURT ERRED BY FAILING TO GIVE A DEFENSE INSTRUCTION WHICH WOULD HAVE CLARIFIED FOR THE JURY THE NATURE OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

For the reasons stated in Appellant's initial brief, Espinosa v. Florida, 6 F.L.W. Fed. S662 (U.S. June 29, 1992), and Sochor v. Florida, 119 L. Ed. 2d 326 (1992), require reversal on this issue. Sochor in particular means that the instruction given below omitted the most important part of the relevant language from Dixon v. State, 283 So. 2d 1 (Fla. 1973). See Sochor, 119 L. Ed. 2d at 339. "Understanding the factor, as defined in Dixon, to apply only to a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim,' we held . . . that the sentencer had adequate

guidance. . . . [T]he Supreme Court of Florida has . . . on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all."

ISSUE X

THE KILLING WAS DONE IN ANGER AND PASSION IN RESPONSE TO SMITH'S TREATMENT OF ATWATER'S AUNT AND THEREFORE WAS DONE WITH A PRETENSE OF JUSTIFICATION AND WAS NOT COLD AND CALCULATED.

The State claims that Appellant's argument on this issue is partially inconsistent with his statement to Dr. Merin and, to the extent that it is inconsistent, cannot be considered. The State cites no authority for this claim, and Appellant knows of none. The State is required to establish aggravating factors beyond a reasonable doubt. The defense is entitled to argue that the State's evidence does not establish aggravating factors beyond a reasonable doubt, quite apart from the defense theory of the case. If the State's claim here were correct, then defendants could never maintain their innocence during the penalty phase, for fear that they would be waiving their objection to the State's failure to prove aggravating factors.

Furthermore, Atwater's statement was admitted to show the basis for Dr. Merin's opinion and was not necessarily substantive evidence. Atwater did not himself testify, and Dr. Merin -- who did testify -- obviously did not believe all of the statement.

Accordingly, the defense is not now necessarily bound by this statement.

The State conveniently omits much of Atwater's statement to Dr. Merin and omits Dr. Merin's testimony on this point. The State claims that Atwater did not say that he was upset about Adele falling when Smith was trying to get "romantic" and did not say that this incident was the reason for his actions. Brief of Appellee at 37. Atwater, however, did in fact tell Dr. Merin about the incident. (R1661-62) Dr. Merin concluded as a result that

> I considered him to be an emotionally immature man, and among his motives for allegedly having engaged in the crime would be a desire to protect his aunt, again having to do with his mother type of thing, to uphold her honor by assuring that she was well-treated by both Kenneth and Tina, while at the same time wishing to be accepted by her as an appropriate and good little boy, a little boy he would have wished to have been had he had an appropriate mother. And by justifying the desire to protect his aunt and while having been under the mild to moderate control reducing effects of his intake of alcohol, he probably experienced an explosion of pent-up fury, resulting in the alleged multiple stab wounds experienced by the victim.

(R1688) (emphasis added)

Dr. Merin's testimony supported the defense theory that Atwater acted with a pretense of moral justification. Moreover, the trial court was obliged to accept this unrebutted testimony. Consequently, the State's claim that the evidence did not support the defense theory was false.

CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN AMENDING THE STANDARD JURY INSTRUCTION BY DELETING THAT PORTION OF THE INSTRUCTION CONCERNING THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

The standard jury instructions tell the jury to determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." The instructions given in this case, however, told the jury only to determine "what mitigating circumstances exist to justify the imposition of a life sentence." (R1755-56, 1817) Later, the standard jury instructions tell the jury to "determine whether mitigating circumstances exist that outweigh the aggravating circumstances." The instructions in this case, however, told the jury only to "determine whether mitigating circumstances exist." (R1758, 1818) The trial court also deleted the standard instruction which required the jury to "weigh the aggravating circumstances against the mitigating circumstances." (R1762, 1819-20)

The court ruled that the jury should not weigh mitigating and aggravating circumstances. "I don't think they should have to find aggravating circumstances outweighing the mitigating circumstances. I want them to consider both aggravating and both mitigating." (R1754) The prosecutor objected that this ruling would leave the jury "really in the dark on . . . how to make this kind of determination." (R1756) As he asked later, "[I]f the jury can't

weigh the aggravating and mitigating circumstances, what are they supposed to do?" (R1762-63)

The court responded that the jurors should "consider each and every one of them and determine whether or not the aggravating circumstances are such that they should recommend death, or the mitigating circumstances are such that they should not. I just think there's no need for them to require them to weigh one against the other." (R1762-63)

Appellant agrees with the State that these jury instructions failed "to properly instruct jurors on their responsibilities." Brief of Appellee at 45. As the State correctly points out, these instructions "result[ed] in confusion or giving contradictory instructions." Id. at 47. These instructions failed to tell the jury what to do if it found that the mitigation outweighed the aggravation. They therefore failed to channel the jury's deliberations in the reasoned manner required by the Constitution. On these instructions, the jury could have recommended death even if it found that the mitigation outweighed the aggravation. The sentencing procedure was therefore unconstitutionally arbitrary and capricious.

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance,"

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of July, 1992.

Respectfully submitted,

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