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IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v.

CASE NO. 76,399

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

ARGUMENT

ISSUE PRESENTED

THE COURT ERRED IN FINDING LAWRENCE KIDNAPPED THE CONVENIENCE STORE CLERK, PAULA TYREE, BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT HE HAD TAKEN HER TO THE STOREROOM WHERE HE KILLED HER.

The state charged Lawrence with one count of kidnapping in connection with the robbery murder of the convenience store clerk, Paula Tyree (T 707). Apparently, its theory was that when the defendant went into the store, he forced her to a storeroom where he then killed her (T 982). **Had** there been any evidence to support that scenario, the state would have had sufficient evidence to support the conviction for kidnapping. Johnson v. State, 509 So.2d 1237 (Fla. 4th DCA 1987). There is, however, no evidence that he ever forced her into that room.

The best the state has on this point to show that Tyree was forced into the back room was what Sonya Gardener saw as

she sat on the front of the Lawrence's car when it was parked near the store:

While I was sitting there on the hood of the car, I saw, it looked like Steve Pendleton walk back towards the back of the coolers, and it looked like Mike went back that way, not all the way .back to where Michael was at -- or Stephen was at, excuse me. But then I saw the store clerk move that way after a little while. I wasn't sitting there paying direct attention to the store. I **was** looking around at other things a the same time.

(T 297-98).

That **was** the best the state could do to show Tyree was forced or taken away from the front of **the** store to the rear. Melvin Summerlin, a jail cell inmate with Lawrence could provide no more details (T204), **and** Rocky Sutton, a prison informant added nothing to support the kidnapping charge (T 425-26). There was, in short, no evidence she was held against her will in the back of the store. To the contrary, a customer who had come into the store only minutes before her murder found her in the back. "I got **my** stuff and I waited for the lady to come out of the back, out of the cooler area."

(T 539)

Tyree, therefore, could **have** been in the back of the store **when** Lawrence and Pendleton came in, and they could have found her there. Such incidental confinement would not have amounted to kidnapping especially since the victim was not bound and gagged, harassed, or held at gunpoint for any length of time. Kennedy v. State, 564 So.2d 1127 (Fla. 1st DCA 1990); Marsh v. State, 546 So.2d 33 (Fla. 3rd DCA 1989). For all the state

proved, the two men could have found Tyree in the back of the store and immediately shot her, or she could have returned to the rear of the store while the men were inside, and she may have said something to Lawrence that made him mad, which caused him to shoot her (T 300). In any event the circumstantial evidence supports with equal plausibility the theory that Lawrence did not confine to the back of the store against her will.

This court should reverse **the** trial court's judgment and sentence on the kidnapping charge. This court should also remand for **a** new sentencing hearing because the court and jury considered this conviction as an aggravating factor in justifying their recommendation and sentence of death (T 980-83).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL ALAN LAWRENCE, #056903, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 4th day of June, 1992.


D. J. DAVIS