FILED
SID J. WHITE
MAY 11 1992
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

GEORGE JAMES TREPAL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,667

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

REPLY BRIEF OF APPELLANT

ROBERT J. KRAUSS
Assistant Attorney General
2002 N. Lois Ave., Suite 700
Westwood Center
Tampa, FL 33607
(813) 873-4739
Florida Bar Number 0238538
Attorney for Appellee

RONALD N. TOWARD, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-0507
Florida Bar Number 258105
Attorney for Appellant

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ARGUMENT

ISSUE #1

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

Just as the prosecutor did at the trial level, Appellee initiates his assault on Appellant with an attempt to cast him as a "mastermind" arch villain; the genius scientist gone mad. Such a highly prejudicial characterization created an aura of insidiousness at trial that was instrumental in securing a conviction for the State. This "genius" image must be seen for what it is, a psychological ploy that is unsupported by the facts.

Appellee alleges that Appellant is "an extremely intelligent man" who "attempted to commit the perfect crime." (Appellee's Brief, pg. 6). The State portrayed Appellant as a genius who was schooled in the act of poisoning and the plots of murder mysteries. As an indication of Appellant's sophistication, Appellee maintains that through the use of returnable bottles, "the perfect crime may have been committed" because ". . . the authorities would not have been able to determine the source of the thallium that was used to poison the Carr family." (Appellee's Brief, pgs. 6-7). In fact, the use of returnable bottles was utterly stupid because it assured that the bottles would remain in the household for a longer period of time awaiting return. Conventional, non-

returnable bottles would have been disposed of as soon as they were empty. It does not take a genius to conclude that the probability of detection is vastly greater when the vessel used for the poison remains at the scene of the crime rather than in a landfill.

If the State's theory of guilt is to be believed, then this genius of a man who allegedly perpetrated this crime:

a. Kept all of his "poison" guides near to his person where they could be found and used as evidence to link him to the homicide;

b. Did not even dispose of the bottle that contained the thallium;

c. Disposed of only the screwdriver used to pry off the bottle caps while leaving the remainder of the set intact;

d. Forecast his intention by sending a note to the Carr family;

e. Earmarked himself as a suspect to individuals he knew to be law enforcement officials by using the same terminology as the author of the threatening note;

f. Incorporated the events of the crime into murder mystery scenarios that were open to public observation.

These are but a few of the major errors that would have been avoided by even the most intellectually average of criminals, but have been attributed to a man who was characterized as the most dangerous and diabolical man you would ever meet (R4181-4182).

Appellee also engages in the same "category of persons" argument that the State utilized at the trial level. This approach is inconsistent with the concept of proof through circumstantial evidence because it seeks to eliminate people from the various categories until only one person remains. Unless the categories result in the isolation of a single person, then the State has failed to carry its burden of proof. While Appellee contends that this process isolates Appellant, Appellant contends that this process reveals other potential perpetrators and thus fails to exclude every reasonable hypothesis of innocence.

The first category of persons identified by the State is that of persons having knowledge about chemistry and thallium. Appellant strongly disagrees that the actions in the instant case necessitated a knowledge of chemistry. It is not necessary to have an extensive knowledge of chemistry in order to pry off a bottle cap and adulterate the soda within. The State's continued contention at trial that a chemical background was necessary in order to select Thallium I Nitrate was a self-serving misinterpretation of the facts.

Evaluations done by State experts revealed six (6) possible thallium combinations: Thallium I Nitrate, Thallium III Nitrate, Thallium sulphate, Thallium malenate, Thallium phosphate, and Thallium formate. All of the thallium salts resulted in a "fizzing" of the Coke, but this was because <u>any</u> solid material with "points" and "corners" would make

the carbonation escape, not because of the thallium element. In contrast, only one of the six salts resulted in a change in the Coke's physical appearance (R3421-3428). From a statistical point of view, the random selection of a poison that contained thallium (either known or unknown to the poisoner) would create an 83 percent chance of utilizing a thallium salt that successfully mixed with Coca-Cola. Even if Thallium III Nitrate was the salt randomly chosen, a simple trial and error test would have eliminated it from consideration as the poison. Accordingly, only a little luck or some common sense was needed to exclude Thallium III Nitrate, not a degree in chemistry. The vast difference in thallium content in each of the bottles belies the scientific mind and suggests a person who was much more inaccurate than would be a chemist (R4057-4061).

Appellee also maintains that the perpetrator must have had a knowledge of thallium (Appellee's Brief, pg. 7). While such knowledge may have been useful to the perpetrator, nothing more than simple knowledge that thallium is poisonous was necessary. This evidence can be gleaned from any chemistry, anatomy, physiology, or home safety book. In addition, Appellant was not the only person who occupies this category. It is astounding that Appellee asserts that Dr. Carr had no knowledge of thallium and, therefore, must be excluded from this category. The very fact that Diana Carr was a physician

establishes her training in chemistry and in the fundamental concerns of diagnosing illnesses. The argument is particularly unpersuasive when it is noted that Dr. Carr's educational background included a Master of Science degree in clinical pathology (R-3579). Even if Dr. Carr had never graduated from high school, she would still remain a viable suspect because she had all of the literature described in Appellee's Brief and attributed to Appellant available to her and, she was an avid reader of murder mysteries. Thus, Dr. Carr constitutes a person with knowledge sufficient to perpetrate this crime, irrespective of her medical degree.

If the issue of medicine is to be addressed, then Pye Carr's sister, Carolyn Dixon, must also be included in this category. Ms. Dixon was a nurse for Drs. Coury and Nobo and had the requisite medical training to obtain her degree. Such training and experience must be considered when determining who fits into the State's "categories." Notably, it was Carolyn Dixon who was with Peggy Carr on October 28, 1988, upon Peggy's recuperation and release from Bartow Memorial Hospital (R1797-1800). Ms. Dixon attempted to give Peggy the thallium-laced Coke, but Peggy rejected the Coke (as she always did) because it was too sweet (R-1800; R-1813). If Peggy did not consume any Cokes after her release from Bartow Memorial Hospital, then a grave question exists as to the source of the thallium that caused her relapse on October 30, 1988 (R-1802). This issue is particularly troubling, and

particularly elucidating concerning Appellant's innocence, when it is noted that Carolyn Dixon observed the Coke carton to be full when she obtained the Coke on October 28, 1988, and that she had not seen the Coke bottles during her prior visits to Peggy (R-1800; R-1814). If the Coke bottles that ultimately were found to contain thallium were not even opened on October 28, 1988, after Peggy had been admitted to and released from the hospital, and if Peggy's condition declined after her initial recovery at Bartow Memorial Hospital despite the fact that she refused to consume any Coke, then the obvious conclusion must be that she was receiving thallium from some other source, a source not even the State can link to Appellant.

Pye Carr cannot be excluded from this category. While Appellee relies upon the statement that Pye Carr knew nothing about thallium, such a conclusion is subject to great skepticism in light of his concern over the Coke bottles before thallium was discovered in them and his knowledge of where to obtain thallium (R3025-3029; R1736-1741). Until told by Pye Carr, law enforcement officials were unaware that thallium could be purchased (R-1736). Thus, Pye Carr remains a member of this category.

Opportunity abounded for anyone who was interested in poisoning the Carr family. Initially, Appellee's statement that Dr. Carr "had a regular job and worked regular hours" is unsupported by the record. No evidence was ever adduced

that Dr. Carr's schedule restricted her to certain places at certain times. There is no doubt that she lived next to the Carr residence, had frequent confrontations with them, was as knowledgeable as anyone concerning their routine, and had at least as much access to their home as did Appellant.

Pye Carr obviously had access to the entire home and could have placed the Cokes in the household at any time. Perhaps it was even Pye Carr's intent to poison Appellant through the use of the Cokes, but the children and Peggy did not honor the household tradition of not touching things located in this special "hiding" place, a household tradition that Appellant would not know (R-1599). As a result, the family was accidentally poisoned when Pye left for his hunting trip in South Carolina. Again, Appellant emphasizes the curious fact that Peggy Carr, who did not drink Coke, and Duane Dubberly, who did not recall ever consuming any of the beverage, were two of the three people with the highest levels of thallium in their system (R-1599; R-1835). The only explanation for such a fact is that the thallium was being ingested from some other source. The record is completely devoid of medical facts concerning the rate at which thallium is excreted from the body, the rate at which it is absorbed into the body, or the amount necessarily consumed to produce the levels ultimately found in Peggy Carr. Accordingly, there is no factual basis to establish how much thallium Peggy Carr consumed, or over what period of time it had been ingested. She could have been the victim of poisoning at the hands of her husband for a long

period of time before other members of the family were accidentally exposed.

Carolyn Dixon, included in the other categories heretofore examined, must also be included in the group of people who had free access to the Carr home. The isolated nature of the household does not limit the number of people who could have surreptitiously planted the poison Coke bottles, as maintained by Appellee, but rather expands the possibilities. This is because an absence of neighbors reduces the probability that an intruder would be detected.

Appellee maintains that Pye Carr would not have committed the crime because he previously divorced one wife and is still paying bills for hospital treatment. Whether Pye Carr alone, or in consort with any other person, would take another's life is unknown. To quote Appellee, " . . . it is often not possible to know why people kill." (Appellee's Brief, pg. 12). Certainly, marital disharmony is one of the oldest and most powerful motives for homicide known to mankind and was present in the Pye Carr/Peggy Carr marriage (R-1725; R-3051; R-3603; R-3666). Even a family member became concerned that Pye Carr's actions constituted an attempt to delay getting treatment for his ailing wife (R-1646). Life insurance policies are meaningless to a man who wants to be rid of his spouse. Perhaps the perpetrator(s) concluded that a civil lawsuit would exist against the Coca-Cola Company thereby obviating the need for any type of insurance.

A unique feature of the prosecution in the case sub judice and of Appellee's brief is how the absence or lack of evidence is manipulated into incriminating proof. The fact that Appellant's fingerprints did not appear on any of the bottles, that no link whatsoever was made between Appellant and the threatening note of June 14, 1988, that the type of screwdriver used to pry open the bottles was never found in his possession, that Appellant did have a bottle capper that a moving man miraculously remembered moving into Appellant's home eight years earlier, or even that the scissors or white-out used in the June 14, 1988, note were not in Appellant's possession does not appear as evidence that Appellant was not involved in this crime, but rather that he destroyed the evidence in an efficient manner. He did all of this only to miss the two most damning pieces of evidence, Q-206 and the "poison" guides, and then created additional evidence against himself through his murder mysteries.

Another unique feature of the prosecution in the case sub judice and of Appellee's brief is how completely innocuous behavior becomes evidence of guilt. Appellant had access to a roll of stamps, he preferred Coke over the other two beverages offered to him during Detective Goreck's "picnic", and he seemed preoccupied whenever Detective Goreck told him he was being sought by the police (R-3763; R-3242; R-3760). All of these were used as evidence of his criminal behavior. No doubt had a roll of stamps not been found by law enforcement, it would have been further evidence of Appellant's thoroughness in disposing of proof; had Appellant selected

a soft drink other than Coke, it would have been evidence both of his fastidious avoidance of anything associated with the poisoning and of his knowledge that Coca-Cola was used as the medium to poison the Carr family; had Appellant maintained his usually talkative manner or contacted the authorities after being advised that he was being sought by the police, it would have been evidence of his belief that he had nothing to fear because he had perpetrated the perfect crime. Given the nature of the prosecution in this case, Appellant could neither act nor refrain from acting in any manner that would not have been interpreted and presented as evidence of guilt.

In an effort to eliminate other persons from the "categories" created by the State, Appellee summarily states that no other person had access to thallium. This bare assertion is particularly blatant in regard to Dr. Carr (Appellee's Brief, pg. 10). While Appellee argues that no one else could have had the thallium, no theory has been propounded by either the State at the trial level or Appellee in its brief, as to how Appellant came into possession of the element. Even the chemical production of amphetamines requires possession of Thallium III Nitrate. Conversely, if Appellant could obtain thallium through some means, would it not then be available to his wife who lives in the same household. In fact, if the substance was kept in Appellant's garage, it would be available to virtually anyone, including Pye Carr and/or Carolyn Dixon, because the record reflects that Appellant and his wife were

frequently gone from the residence and the garage was unsecured (R-3689). If the thallium was available to Appellant, as the State Contends, then it, de facto, became available to all of the persons who otherwise are members of the "categories", particulary Dr. Carr.

Appellee's argument regarding a judgment of acquittal as to first degree murder is not persuasive. Using the same premise used by the State at the trial level, Appellee argues that if Appellant intended to scare the Carr family, he could have used a substance that resulted in a discoloration of the Coke. Since this portion of Appellee's brief assumes, arguendo, that the evidence was sufficient to prove Appellant placed the poison in the Coke, it is not too callous to suggest that using a substance that changed the color of the Coke would not achieve the intended result. Such an action would only result in disposal of the Cokes which would not further the plan of making the members of the Carr household sick. If Appellant was acting out of ill will, hatred, or spite, his conduct would have been calculated to injure, but not necessarily kill, Pye and/or Peggy Carr. If death resulted from that conduct, then Appellant would have been guilty of second degree murder.

Evidence in this regard was wholly lacking. Appellee amply illustrates that one Coke bottle contained the bare minimum lethal amount of thallium. The remaining bottles contained less than one gram of thallium. Reliance on

Dr. Melamud's testimony that Peggy Carr weighed 100 pounds is an unjustified distortion of the truth because that weight was taken at the time of death, after almost six months of being on life support systems. There was certainly no suggestion that Appellant knew that an entire 16 ounce Coke would be ingested by one person at one time, thus resulting in the summary introduction of one gram of thallium into the body. Likewise, contrary to Appellee's conclusion, no scientific basis was offered at trial to demonstrate a corrolation between the washings of the empty bottles and the amount of thallium they contained when full. There existed no basis for such an extrapolation.

The law regarding circumstantial evidence has not changed since Law v. State, 559 So.2d 187 (Fla. 1989):

> Consistent with the standard set forth in Lynch, if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla. R. Crim. P. 3.380. (Case citations omitted).

Neither the State below nor Appellee have presented evidence to contradict Appellant's contention that the homicide and attendant crimes could have been committed by another person, to-wit: Dr. Diana Carr, Pye Carr, Carolyn Dixon, or an unknown individual who tampered with a product that set this string of events in motion. Appellant's Motion for Judgment of Acquittal should have been granted by the trial court.

ISSUE #2

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS?

Appellee's reliance on Lewis v. State, 385 U.S. 206, 87 S.Ct. 425, 17 L.Ed.2d 312 (1966) is totally misplaced and the quotation therefrom taken out of context.

In Lewis, the Defendant was using his home to sell cannabis. An undercover officer made arrangements to purchase cannabis and two sales were consummated within Defendant's home. Defendant alleged that the entry into the home violated his rights under the Fourth Amendment because the officer gained entry into the home through fraud and deception. The Court rejected Defendant's claim and distinguished Gouled v. United States, 255 U.S. 298, L.Ed. 647, 41 S.Ct. 261 (1921):

> In the instant case, on the other hand, the petitioner invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. Lewis, 385 U.S. 210 (emphasis supplied).

Appellee's quotation from Lewis, supra, is taken entirely out of context and distorts the legal principle enunciated in the case. A review of the entire passage supports Appellant's contention that the actions of law enforcement in the instant case were unlawful under the precepts of the Fourth Amendment and Article I, Section 23 of the Florida Constitution.

> [3] Without question, the home is accorded the full range of Fourth Amendment protections. But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business,

> that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the Gouled case, supra, is sufficient to dispose of that contention. Lewis, 385 U.S. 211.

Appellee also maintains that Appellant "never reserved any right to possession." This statement is potently false. The record is uncontradicted that Appellant owned the real property in question (R-4830). By virtue of such ownership, Appellant was always entitled to possession. He could have removed Goreck from occupancy at any time because of his superior possessory interest. He maintained a key to the residence (R-4790). Appellee's assertion that Appellant never returned to the premises is completely inaccurate. He returned on at least one occasion, but did not complete the intended repairs because the painter failed to appear (R-4792). He also appeared in proxy via Leland Young whom Appellant asked to keep an eye on the home on a daily basis (R4834-4835).

Appellee further misstates the record in regard to the argument that Appellant had abandoned the contents of the garage. While Detective Mincey testified that a mover told

him that Appellant had classified the contents of the garage as "trash", Detective Goreck testified that Appellant specifically told her that he had not finished all of his moving activities and that he said "I'm still cleaning out the garage slowly." (R-4791). Such a statement indicates that Appellant was still in the process of determining what he would keep and what he would dispose of. This is a common experience among movers. As they move into their new homes, daily decisions are made on a piece-meal basis as to what can be used in the new residence and what should not be retained.

Even if the contents of the garage were trash, Appellee's citation of California v. Greenwood, 486 U.S. 35, 100 L.Ed.2d 30, 108 S.Ct. 1625 (1988), merely provides additional authority for Appellant's position. In Greenwood, law enforcement officials suspected Greenwood of narcotics trafficking. They asked the local trash collector to isolate Greenwood's garbage so that they could search it. Narcotics related items were found in the trash, a search warrant was issued for Greenwood's residence based upon the items contained in the trash, and quantities of cocaine and hashish were found in Greenwood's home.

In reversing the suppression of the narcotics, the Supreme Court wrote:

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children,

> scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector . . .
>
> . . .
>
> In United States v. Thornton, 241 U.S. App. DC 46, 56, and n 11, 746 F.2d 39, 49, and n 11 (1984), the court observed that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege (sic) thereof." Greenwood, 486 U.S. 40, 42 (citations and footnotes omitted) (emphasis supplied).

The key element in Greenwood and its progeny is the placing of the discarded items within "the public domain" with the intent to leave it outside of the home or curtilage. Q-206 was not placed into public view. It remained securely encased within the chest of drawers that was located within the closed garage that, in turn, was located within the curtilage of Appellant's estate. It was not knowingly exposed to the public.

ISSUE #3

DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF NUMEROUS ITEMS OF TESTIMONY PURSUANT TO SECTION 90.404(2), FLORIDA STATUTES?

In his Initial Brief, Appellant challenged the admissibility of the evidence referred to as "Williams Rule" evidence on numerous grounds. The attack on the propriety of permitting such testimony was not limited to a consideration of Section 90.404, Florida Statutes. While this is the only aspect of Appellee's response, Appellant maintained that the evidence should have been excluded for numerous other reasons, including hearsay, prejudicial effect, expert qualification, and denial of the right to cross-examination. (Appellant's brief, pgs. 67-68; 70-73). Without citing authority, Appellee broadly states that all of the evidence was admissible.

Particularly illustrative of this abuse was the prosecutor's elicitation of testimony regarding Appellant's nonaggressive behavior and the emphasis that was placed on this character trait during the prosecutor's closing argument (R-4276). In Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), the court held that use of offender profile testimony is not admissible as substantive evidence to prove the guilt of the accused. The Flanagan court did not reverse the conviction on that basis because the testimony took only 2 of 64 pages of expert testimony and was never mentioned again. However, in Phillips v. State, 589 So.2d 1360 (Fla. 1st DCA 1991), the

court reversed a conviction for sexual battery upon a child less than 12 years of age because the prosecutor made such testimony a feature of closing argument.

In the case sub judice, testimony was admitted regarding Appellant's aversion to hostility and then the prosecutor made such an aversion a character profile of a poisoner. He did so repeatedly and without the benefit of expert testimony. Appellee fails to address the prosecutor's conduct except to say that defense counsel's failure to object precludes appellate review. This is not necessarily the case. Arguments concerning future dangerousness, epithets, personal beliefs in guilt, and character assassination when Appellant has not placed his character in issue are all prohibited. Rahmings v. State, 425 So.2d 1217 (Fla. 2d DCA 1983); Williams v. State, 425 So.2d 591 (Fla. 3d DCA 1982); Green v. State, 427 So.2d 1036 (Fla. 3d DCA 1983); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984). The prosecutor engaged in all of these activities.

In Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), the court reversed Defendant's convictions based upon comments in the prosecutor's closing statement even absent meaningful object. The court wrote:

> . . . we need not consider whether the errors preserved by the single mistrial motion and the single additional objection would be sufficient in themselves to require reversal.[5] This is so because we are convinced beyond question that

> the contents of the final argument, taken as a whole, were such as utterly to destroy the defendant's most important right under our system, the right to "essential fairness of [his] criminal trial." Thus, the record presents fundamental error, error which reaches into the very heart of the proceeding, and which would therefore mandate a new trial even in the total absence of timely preservation below. Specifically, it is well established in Florida that when, as here, references in argument during a criminal trial are "of such character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or exception."
>
> . . .
>
> The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client. Peterson, pgs. 1234-1235. (citations omitted).

The prosecutorial comments in the case sub judice were so inflammatory as to constitute fundamental error.

ISSUE #4

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE BY WHICH THE JURY COULD CONCLUDE BEYOND A REASONABLE DOUBT THAT APPELLANT CAUSED THE DEATH OF PEGGY CARR AND WHERE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE LEGAL MEANING OF "CAUSE OF DEATH"?

Appellant would submit that the issues presented in the fourth point on appeal have been adequately briefed so as to not require additional argument at this juncture.

ISSUE #5

DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY FAILING TO CHARGE THE JURY ON THE MAXIMUM AND MINIMUM PENALTIES FOR THE OFFENSE OF FIRST DEGREE MURDER?

Appellant acknowledges that this issue has been decided adversely to his position. Wright v. State, 17 F.L.W. S229 (Fla. April 9, 1992).

ISSUE #6

DID THE TRIAL COURT BELOW ABUSE ITS DISCRETION IN REFUSING TO GIVE APPELLANT'S REQUESTED CIRCUMSTANTIAL EVIDENCE INSTRUCTION BECAUSE, BY MISSTATEMENT, THE TRIAL COURT DID NOT AFFORD APPELLANT THE FULL PROTECTIONS OF THE REASONABLE DOUBT INSTRUCTION?

Appellant timely and properly requested an instruction on circumstantial evidence (R4017-4018). The fact that Appellant did not request an additional instruction, or the former standard instruction, is irrelevant.

Appellant previously has analyzed the rationale for the elimination of the circumstantial evidence instruction (Appellant's brief, pgs. 92-93). This rationale can only be credible where the remaining instructions are accurately given to assure that the jury is fully advised of their legal obligations and of the law to be applied. Even under those circumstances, a factual scenario may exist where the failure to give a circumstantial instruction is an abuse of discretion. Appellant contends that the case sub judice is such a scenario.

Appellee fails to accurately recite the facts upon which Appellant bases this error. Not only did the trial court incorrectly state that the jury "should" rather than "must" return a verdict of not guilty if they had a reasonable doubt, the trial court also completely excluded the instruction to the jury that the presumption of innocence must " . . . be overcome by the evidence to the exclusion of and beyond a reasonable doubt." (R-4285). A failure to adequately and

correctly instruct the jury may result in error requiring a new trial. Ruffner v. State, 590 So.2d 1054 (Fla. 3d DCA 1991); Gerds v. State, 64 So.2d 915 (Fla. 1953).

Appellee's reliance on Thomas v. State, 525 So.2d 945 (Fla. 4th DCA 1988) is unwarranted. In Thomas, trial counsel did not object to the incorrect instruction, there was only one error in the instructions and, most importantly, defendant did not even contest the sufficiency of the evidence against him. None of those facts apply to the instant case.

ISSUE #7

DID THE TRIAL COURT ERR IN IMPOSING A DEATH SENTENCE?

A. PRIOR VIOLENT FELONY.

Appellee analyzes the application of the aggravating circumstance set forth in Section 921.141(5)(b), Florida Statutes, to the statutory determination that effecting a death through the use of a destructive device constitutes first degree murder. Section 782.02(1)(a)2j, Florida Statutes. This statute illustrates the necessity of specific legislative language to circumscribe particular conduct. This is the nature of Appellant's argument regarding previous convictions for violent felonies. Appellant does not argue that contemporaneous convictions cannot qualify for this aggravating circumstance, but rather that existing caselaw requires direct contact with the victim. Such interpersonal contact is a prerequisite to the existence of this circumstance.

B. GREAT RISK OF DEATH TO MANY PERSONS.

Appellant disagrees with Appellee's assertion that King v. State, 514 So.2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988), and White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983) are distinguishable from the instant case. In particular, there existed only a mere possibility that someone in the Carr household would consume enough Coke to expire. In addition, Appellee fails to address

the "counter balance" argument presented by Appellant. That is, because the degree or probability of risk of death decreased when the number of people exposed increased, then this factor may not exist. Each factor counter-balances the other so as to diffuse either the "great risk of death" or "many persons" aspect of this factor. By including all of the people who may have frequented the Carr household, the trial court engaged in speculation as to how many, if any, would have consumed the Coke. Such speculation is impermissible. White and King, supra.

C. COLD, CALCULATED, AND PREMEDITATED.

Appellee fails to respond to the arguments created under Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). The fact that a death occurred is insufficient to establish the de facto existence of this circumstance.

D. PROPORTIONALITY.

Appellant has demonstrated himself to be a quiet, shy individual. This was an observation made by the trial judge during five weeks of trial and several months of pretrial preparation (R-5553). It was readily apparent from all facts and circumstances that Appellant was kind-hearted and generous. The issue of whether the sentence of death was proportionate must be viewed not only in comparison to other capital cases, but in comparison to Appellant's record as a member of society. Even under the most difficult of circumstances, Appellant

assisted others and maintained his respect for those who simply were doing their jobs (R-5553). Given this history and behavior, a single aberrant act should not result in his death.

Appellant respectfully extends his appreciation for this Court's time and consideration.

CONCLUSION

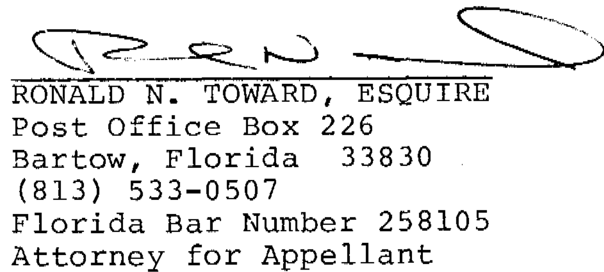
Based upon the foregoing arguments and authority, this case should be remanded to the trial court with instructions to grant Appellant's Motion for Judgment of Acquittal. In the alternative, because of errors that were committed in the court below, the case should be remanded for a new trial. Absent this court's finding that sufficient errors were committed to grant either of the foregoing requests, the imposition of the death penalty was inappropriate and the matter, accordingly, should be remanded with directions to impose a sentence of life imprisonment in regard to the conviction for first degree murder.

RESPECTFULLY SUBMITTED this 7th day of May, 1992.

RONALD N. TOWARD, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-0507
Florida Bar Number 258105
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Appellant has been furnished to Robert J. Krauss, Assistant Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607, by regular U.S. mail, this 7th day of May, 1992.



RONALD N. TOWARD, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-0507
Florida Bar Number 258105
Attorney for Appellant