IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

v. Case No. 78,336

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY

SUPPLEMENTAL BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

SUMMARY OF THE ARGUMENT

Appellant claims that his sentence was unconstitutionally imposed because he was limited by the trial court in his presentation of mitigating evidence to the jury. This claim is without merit. The few limitations imposed by the trial court, in the instant case, were within the court's discretion and appellant has failed to show an abuse of that discretion.

The challenge to the prosecutor's closing argument is procedurally barred because counsel did not object to the statement until after the jury retired and after an evidentiary hearing on a collateral matter was held. The failure to raise a contemporaneous objection bars appellate review.

As to the cross-examination of Bridget Chapman, a review of the record shows that on direct examination, defense counsel specifically asked Chapman about the defendant's character. Having put Johnson's character at issue, the defense could not preclude the state from inquiring further to evaluate the violent aspects of that character.

Appellant alleges that although the trial court found his mental state to be nonstatutory mitigation, the trial court improperly rejected the statutory mitigating factor of extreme mental or emotional disturbance. When reviewed as a whole it is clear that the trial court properly rejected the extreme mental or emotional disturbance mitigating factor.

Appellant claims that the jury was given misleading and incomplete instructions, resulting in an unreliable penalty

recommendation and sentence. It is the state's position that the jury was properly instructed.

Appellant's challenge to the "automatic aggravator" has been squarely rejected by both federal and state courts.

Appellant claims that the aggravating circumstances of heinous, atrocious, or cruel murder is unconstitutional because it is vague, is applied arbitrarily and capriciously, and does not narrow the class of persons eligible for the death penalty. It is the state's position that this claim should be rejected because it has not been preserved for appeal and because this Court has repeatedly rejected challenges to the constitutionality of the factor.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRONEOUSLY LIMITED THE PRESENTATION OF MITIGATING EVIDENCE.

Appellant claims that his sentence was unconstitutionally imposed because he was limited by the trial court in his presentation of mitigating evidence to the jury. This claim is without merit.

In Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) the United States Supreme Court made it clear that the Court has never held "that jury discretion must be unlimited or unguided; [they] have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; [they] have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." Franklin v. Lynaugh, 487 U.S. 164, 181 (1988). The few limitations imposed by the trial court, in the instant case, were within the court's discretion and appellant has failed to show an abuse of that discretion.

Appellant's first claim is that he should have been allowed to argue to the jury that death was not the appropriate sentence because in addition to the possible life sentence with a twenty-five year minimum mandatory that he faced for the murder of Iris White, that he also faced the possibility of lengthy sentences in the other pending cases. Recently, in Marquard v. State, 19 Fla. L. Weekly S314 (Fla. June 9, 1994), this Court reviewed a similar

claim. At the conclusion of the penalty phase Marquard's counsel was precluded from arguing to the jury that in addition to the twenty-five year minimum mandatory on the homicide that the defendant also faced sentencing for a separate crime of armed robbery. In rejecting the claim this Court held that the trial court properly limited defense counsel's argument because "sentencing on that charge was not before the jury - the sole issue before them was the proper sentence on the murder charge. Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990), cert. denied, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991) ('As to offenses in which the jury plays no role in sentencing, the jury will not be advised of possible penalties.')" In the instant case, the possible sentences that Johnson would receive for the non-capital felonies in Cornell, Giddens, and White were properly excluded because the sole issue before the jury was the sentencing on the White murder charge.

Appellant also argues that he should have been allowed to show jurors a picture of his miscarried baby. Again this is a matter within the discretion of the trial court. This Court has long followed the rule that the photographs are admissible only if they are relevant and not so shocking in nature as to defeat the value of their relevance. Czubak v. State, 570 So. 2d 925 (Fla. 1990). The trial court's determination that the prejudicial value of the photo of the miscarried baby far outweighed the probative value was within the court's discretion and appellant has failed to show an abuse of that discretion.

Furthermore, even if the photograph should have been admitted, the exclusion was harmless. In addition to the presentation of substantial aggravating evidence, the limitation was especially harmless in light of the fact that Johnson was allowed to argue the content of the photograph, show the inscription on the back and have several witnesses testify as to the impact the miscarriage had on him. (R. 5833, 5913-15, 5981-84, 5998, 8632) Even without being needlessly subjected to the picture of the dead baby, the jury had sufficient information to evaluate the impact that the miscarriage may have had in the way of mitigating the instant murder.

Appellant also contends that the court improperly limited medical records from Mississippi and Sarasota. A review of the record shows that the prosecutor objected to the records because they "were only part of a medical record that does not fully explain what it was." (R. 5985) He also contended that the records showed the presence of drugs but did not explain whether they were prescribed to him or whether he did something improper. The records were not capable of being explained by the defendant's witness. The court excluded the records but allowed Johnson's mother to testify about the incident. Similarly, the court excluded records from the Sarasota jail because they were not being presented through the records custodian, the testifying witness could not verify them or explain their content. (R. 6011) The court informed counsel that he would admit the records if the defense laid the proper foundation. (R. 6012) Although

counsel failed to authenticate the records and Johnson's mother was allowed to testify concerning the attempted suicide, Johnson contends that the records should have been admitted because they were self-explanatory and were admissible as hearsay.

A review of the records does not support this claim. Defendant's Exhibit #4 is not the original medical record, but, rather, merely is a discharge summary taken from the South Washington County Hospital' microfilm file. As the court found, the summary merely represents that Johnson had taken an unknown amount of a drug. It does not say whether he had been misprescribed, accidently overdosed, taken an illegal drug or attempted suicide. (R. 8674-5) In both cases the defense was either unable to or did not feel that it was important enough to warrant complying with the rules of evidence to have the records custodian authenticate the records, despite the court's direction. Garcia v. State, 564 So. 2d 124 (Fla. 1990); Davis v. State, 562 So. 2d 431 (Fla. 1DCA 1990). See, also, Suggs v. State, 19 Fla. L. Weekly S423, S425 (Fla. Sept. 1, 1994). "While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded . . . [There is no merit] to [the] claim that the state must abide by the rules but that the defendant need not do so." Griffin v. State, 19 Fla. L. Weekly S365, 367 (Fla. July 7, 1994). Under these circumstances, the trial court properly sustained the state's objection.

Furthermore, error, if any, was harmless. Although, the records were not admitted, Johnson was allowed to present

testimony concerning both events. Thus, given overwhelming evidence in aggravation and the admission of this testimony, it is beyond a reasonable doubt that death would have been imposed even if the jury was allowed to see the incomplete medical reports.

Johnson also contends that it was error for the trial court to preclude him from introducing evidence that the death penalty does not function well as a deterrent or was more expensive than life in prison. First, it is the state's position that this claim has not been preserved for appellate review. Although defense counsel made a pretrial motion to introduce this evidence, the undersigned cannot find and appellant does not allege that this motion was renewed during the penalty phase. (R. 1800-05) Upon ruling on the motions the trial court stated that he felt the evidence was not relevant and that he was denying the motion at this time. The failure to renew the motion during the penalty phase should preclude review.

Even if this claim was properly before this Court, it is without merit. In King v. Dugger, 555 So. 2d 355, 359 (Fla. 1990), this Court made it clear that Lockett v. Ohio, 438 U.S. 586 (1978) requires only that a sentencer 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' Lockett does not limit the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the

defendant's character, prior record, or the circumstances of his offenses. Hitchcock v. State, 578 So. 2d 685, 689 (Fla. 1990). The evidence urged below does not fall within any of these categories. These studies are not relevant to Johnson's character, prior record or circumstances of the crime. The exclusion of this evidence was within the court's discretion and Johnson has failed to show an abuse of that discretion.

ISSUE II

WHETHER THE TRIAL COURT IMPROPERLY FAILED TO LIMIT THE STATE'S CROSS-EXAMINATION AND ARGUMENT TO THE JURY.

Appellant contends that the trial court improperly failed to limit the state's cross-examination of defense witness Bridget Chapman about Johnson's violent character and the prosecutor's closing argument where he alleged that Johnson had inflicted wounds to Iris White's anus. It is the state's position that Johnson is not entitled to relief on either claim.

The challenge to the prosecutor's closing argument, that claim is procedurally barred because counsel did not object to the statement until after the jury retired and after an evidentiary hearing on a collateral matter was held. (R. 6130) The failure to raise a contemporaneous objection bars appellate review. Suggs v. State, 19 Fla. L. Weekly S423 (Fla. Sept. 1, 1994); Wyatt v. State, 19 Fla. L. Weekly S531, S352 (Fla. May 5, 1994); Nixon v. State, 572 So. 2d 1336 (Fla. 1990). Furthermore, the comments were proper. Mann v. State, 603 So. 2d 1141 (Fla. 1992) (state may comment on the evidence).

As to the cross-examination of Bridget Chapman, a review of the record shows that on direct examination, defense counsel specifically asked Chapman about the defendant's character. Having put Johnson's character at issue, the defense could not preclude the state from inquiring further to evaluate the violent aspects of that character. Squires v. State, 450 So. 2d 208, 210-11 (Fla. 1984). See, also, Jackson v. State, 530 So. 2d 269 (Fla. 1988).

ISSUE III

WHETHER THE TRIAL COURT CORRECTLY REJECTED THE STATUTORY MITIGATING FACTOR OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Appellant alleges that although the trial court found his mental state to be nonstatutory mitigation, the trial court improperly rejected the statutory mitigating factor of extreme mental or emotional disturbance. The decision as to whether mitigation has been established lies with the trial court. Petit v. State, 591 So. 2d 618, 621 (Fla. 1992); Sireci v. State, 587 So. 2d 450 (Fla. 1991). To challenge the trial court's finding with regard to an alleged mitigating factor, an appellant must show that the trial court abused its discretion. Wyatt v. State, 19 Fla. L. Weekly S531, 352 (Fla. May 5, 1994); Cook v. State, 542 So. 2d 964 (Fla. 1989); Scull v. State, 533 So. 2d 1137 (Fla. 1988). When reviewed as a whole it is clear that the trial court properly rejected the extreme mental or emotional disturbance mitigating factor.

In the instant case, other than the actual facts of the crime there was nothing to suggest any mental infirmity on the part of the defendant. Clearly, the fact that the defendant committed an unusually brutal and heinous crime does not warrant a per se conclusion on the part of the trial court that the defendant suffered from mental infirmity. Duncan v. State, 619 So. 2d 279 (Fla. 1993) (error for trial court to find extreme emotional or mental disturbance where only evidence was that

defendant went crazy when he killed victim). Many otherwise sane criminal defendants commit heinous and atrocious acts that are beyond the consideration of the average citizen. E.g., Trepal v. State, 621 So. 2d 1361, cert. denied, 114 S.Ct. 892 (1993); Gillian v. State, 582 So. 2d 610 (Fla. 1991); Sanchez-Valesco v. State, 570 So. 2d 908 (Fla. 1990). Similarly, many otherwise normal defendants get depressed or attempt suicide. See, Krawczuk v. State, 19 Fla. L. Weekly S 134 (Fla. March 17, 1994); Hodges v. State, 595 So. 2d 929 (Fla. 1992).

As there was competent evidence to support the court's rejection of the factors, this finding of fact should be presumed correct and affirmed by this Court.

ISSUE IV

WHETHER APPELLANT'S JURY WAS IMPROPERLY INSTRUCTED, RESULTING IN AN UNRELIABLE DEATH RECOMMENDATION AND SENTENCE.

Appellant claims that the jury was given misleading and incomplete instructions, resulting in an unreliable penalty recommendation and sentence. It is the state's position that the jury was properly instructed.

First, appellant claims that the trial court erred in denying his request to delete the words "extreme" and "substantially" from the standard instruction on the mental mitigators. As appellant concedes, however, this Court in Stewart v. State, 558 So. 2d 416 (Fla. 1990), rejected this identical claim, stating:

> . . . Defense counsel asked that both instructions be given and requested that the qualifiers "extreme" and "substantially" be deleted. The court properly refused to give the modified instructions."
>
> Id, at 420.

See, also, Walls v. State, 19 Fla. L. Weekly S377, S379 (Fla. July 7, 1994).

The jury was not limited on possible mitigating evidence it could consider and it is clear that the trial court considered Johnson's mental state in consideration of both statutory and nonstatutory mitigating factors. (R. 8814-15) No error was committed.

Next appellant claims that the jury instructions are erroneous because they do not set out a standard for weighing

aggravating factors versus mitigating factors. A similar challenge to Florida's weighing process was rejected in Ford v. Strickland, 696 F. 2d 804 (11th Cir. 1983).

> Third, Ford's argument under *In re Winship* seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, *see State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617 - 18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969. Indeed, it appears no case has applied *In re Winship in* the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of *In re Winship. See State v. Johnson* 298 N.C. at 74, 257 S.Ed.2d at 617; *State v. Woods*, 648 P.2d 71 (1981).

Neither Florida law nor the constitution require that a specific burden of proof govern the jury's weighing process. See, United States v. Chandler, 996 F. 2d 1073 (11th Cir. 1993). This Court has repeatedly set out the guidelines for weighing aggravating against mitigating and, in accordance with the statute, has never found the applicability of a standard to that process. E.g., Campbell v. State, 571 So. 2d 415 (Fla. 1990); Rogers v. State, 511 So. 2d 526 (Fla. 1987). Accordingly, this claim should also be rejected.

Appellant also raises the much rejected argument that the standard instructions unconstitutionally shift the burden of proof to the defendant to prove that death is not the appropriate sentence. Again, this claim has been consistently rejected by this Court. Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991) Kight v. Dugger, 574 So. 2d 1066, 1071 (Fla. 1990); Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989); Preston v. State, 531 So. 2d 154, 160 (Fla. 1988).

Finally, appellant contends that the jury instructions constituted a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). It is the state's position that the instructions given to the jury were an accurate statement of Florida law and the jury's role. Where the trial court gives the jury an accurate statement of Florida law this Court has held that there is no violation of Caldwell. Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993); Rose v. State, 617 So. 2d 291, 297 (Fla. 1993); Combs v. State, 525 So. 2d 853 (Fla. 1988); Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). This position has been upheld in the United States Supreme Court upon review. Dugger v. Adams, 489 U.S. 401, 407 (1989); Darden v. Wainwright, 477 U.S. 168, 184, n. 15 (1986).

ISSUE V

WHETHER THE 'FELONY MURDER' AGGRAVATING FACTOR IS UNCONSTITUTIONAL BECAUSE IT CONTAINS AN ELEMENT OF FIRST DEGREE MURDER.

Appellant claims that the aggravating circumstance of committed during the course of a felony contains the same elements as felony murder and is, therefore, unconstitutional because it creates an 'automatic aggravating factor' in each case of felony murder. Appellant's challenge to the "automatic aggravator" has been squarely rejected by both federal and state courts. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n. 15 (11th Cir. 1986); Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983); Stewart v. State, 588 So. 2d 972 (Fla. 1991); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988); Clark v. State, 443 So. 2d 973 (Fla. 1983); Menendez v. State, 419 So. 2d 312 (Fla. 1982); White v. State, 403 So. 2d 331 (Fla. 1981). In Lowenfield, supra, the United States Supreme Court observed that as long as the required narrowing process occurred in a capital case, the fact that an aggravating circumstances duplicates one of the elements of the crime does not make the death sentence constitutionally infirm. The Court observed that in the State of Florida, the definition of a capital offense is narrowed by the finding of aggravating circumstances at the penalty phase. Therefore, the United States Supreme Court has already sanctioned the permissibility of using what appellant would describe as an "automatic aggravator" and no constitutional infirmity appears.

The jury instruction correctly stated the law. Accordingly, Appellant is not entitled to relief.

ISSUE VI

WHETHER THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE.

Appellant claims that the aggravating circumstances of heinous, atrocious, or cruel is unconstitutional because it is vague, is applied arbitrarily and capriciously, and does not narrow the class of persons eligible for the death penalty. It is the state's position that this claim should be rejected because it has not been preserved for appeal and because this Court has repeatedly rejected challenges to the constitutionality of the factor as set forth in the statute.

The jury in the instant case was instructed on the heinous, atrocious, or cruel aggravating factor as follows:

> Three, the crime for which the defendant is to be sentenced was especially, heinous, atrocious or cruel.
> Heinous means extremely wicked or shockingly evil [sic].
> Atrocious means outrageously wicked and vile.
> Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional facts that show the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
> (R. 6107)

This is the standard instruction which has been repeatedly upheld by this Court as constitutional. Fennie v. State, 19 Fla. L. Weekly S437 (July 7, 1994); Hall v. State, 614 So. 2d 473 (Fla 1993); Elledge v. State, 613 So. 2d 434 (Fla. 1993).

Furthermore, this claim is procedurally barred. In Castro v. State, 19 Fla. L. Weekly S435 (Fla. September 8, 1994), this Court made it clear that in order to preserve the claim for review counsel must not only object to the instruction, but must also provide the court with alternate language. Johnson provided the following proposed instruction to the court:

DEFENDANT'S SPECIAL REQUESTED PENALTY PHASE

JURY INSTRUCTION NO. 21

> With regards to aggravating circumstance (H), the following definitions of atrocious means outrageously wicked and vile; cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the normal capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim.
>
> Lucas v. State, 379 So.2d 1149 (Fla. 1979) [sic]
>
> (R. 8481)

As this proposed instruction is virtually identical to the instruction given, appellant cannot claim that he adequately challenged the wording of the instruction.

Furthermore, even if the instruction was insufficient, error, if any, was harmless. Under any definition of the term the murder in the instant case was clearly heinous, atrocious, or cruel. The victim Iris White was a 72 year-old woman with a heart condition. Johnson knew Iris White. He knew that she lived alone and could not possibly defend herself. Johnson

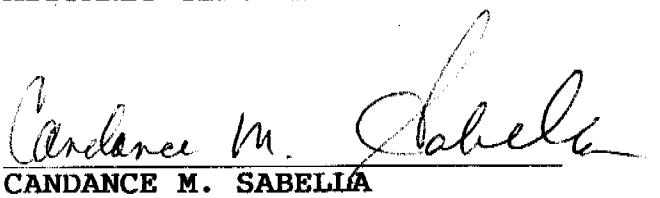
entered the home, overpowered the elderly victim and forced her into the bedroom. After choking her into unconsciousnes, he went to the kitchen and got two knives. Johnson then savagely attacked the helpless victim. She received over twenty stab wounds to the face, to the neck, to the chest, and lungs. The record also shows that Iris White had defensive wounds on her hand. Based on these facts the instruction and finding of heinous, atrocious, or cruel should be upheld. See, Campbell v. State, 571 So. 2d 418 (Fla. 1990); Hansborough v. State, 509 So. 2d 1081 (Fla. 1987).

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33830, this 30th day of September, 1994.

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