IN THE SUPREME COURT OF FLORIDA

DOMINICK DEANGELO,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NUMBER: 78,499

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-APPELLEE

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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)
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STATE OF FLORIDA,)
)
Plaintiff/Appellee.)
_____,

REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEATH PENALTY IN THIS CASE MUST BE REDUCED TO LIFE, BECAUSE IT IS NOT SUPPORTED BY ANY VALID STATUTORY AGGRAVATING FACTOR, THE TRIAL COURT FOUND SUBSTANTIAL MITIGATING CIRCUMSTANCES AND IGNORED UNREFUTED MITIGATION. THE DEATH SENTENCE IS OTHERWISE DISPROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State Failed To Prove Beyond A Reasonable Doubt That The Murder Was Cold, Calculated, And Premeditated.

In arguing that the murder was **cold,** calculated, and premeditated, Appellee relies heavily on the fact that Deangelo strangled Price. Appellee points out that the medical examiner's testimony indicated that death **could** take approximately seven to ten minutes to occur. Certainly, strangulation is not as quick as other types of death, e.g., a gunshot. Nevertheless, Appellant submits that a strangulation murder is not *per se* cold,

calculated, and premeditated. In fact, it makes sense that a person could become so enraged that he could actually kill another person with his bare hands. If this Court accepts the State's argument, it must announce a new rule of law that all strangulations justify a finding of this aggravating circumstance.

The State contends that Douglas v. State, 575 So.2d 165 (Fla. 1991), is distinguishable from Deangelo's case. Appellee points out that Douslas had (1) passion, (2) the relationship between the parties, and (3) the circumstances leading up to the murder all of which negated a finding of cold, calculated, and premeditated. These facts also negate a finding of this aggravating circumstance in Deangelo's case. Although Deangelo and Price had known each other only a short time, they clearly had a relationship that was consumed by passion. Deangelo and Price's stormy relationship resulted in Price's murder. The Attorney General concedes that Deangelo was "fed up with Mary," but insists that the facts show that he coldly planned to kill her. The facts are much more consistent with Deangelo finally reaching his breaking point and then killing Price.

Appellee attempts to distinguish Capehart v. State, 583 So.2d 1009 (Fla. 1991), and Holton v. State, 573 So.2d 284 (Fla. 1991). The State points out that there was some question of Capehart and Holton's intent to kill and contends that there is no question as to Deangelo's intent. Appellant begs to differ. Deangelo's voluntary but incriminating confession after his

arrest on the day of the murder clearly reveals that one of their frequent arguments escalated into a physical confrontation. In an attempt to quiet Price, Deangelo strangled her to death.

The State also relies heavily on Deangelo's "dry run" one to two weeks before the murder. This is further evidence of Deangelo's continuing problems in his relationship with Price. Even so, he abandoned the "dry run" and, contrary to the State's assertions, ultimately killed Price several "opportunities" later. Deangelo did not kill Price "the next opportunity he had." Under the State's theory, Deangelo had a perfect opportunity to murder Price before his wife came home. This fact also supports Deangelo's confession indicating that he killed Price during an escalating argument. At the very least, the State failed to meet its burden of proving this aggravating circumstance beyond a reasonable doubt.

The Trial Court Improperly Rejected Unrefuted Statutory Mitigating Circumstances.

Deangelo maintains that the trial court, without any basis in law or fact, improperly rejected the unrefuted evidence that the two statutory mental mitigators were present. Appellant recognizes that it would be a different matter if there were conflicting evidence on the issue. Contrary to the State's assertion, the trial court did not question Dr. Berland's credibility. Rather, it appears that the trial court applied an inappropriate standard of proof. Furthermore, the trial court's reliance on the testimony of Deangelo's wife and brother in rejecting the mitigating evidence was completely inappropriate.

Once again, Appellant invites this Court to examine the testimony of Dennis and Joy Deangelo in a futile search for any basis for the trial court's rejection of Dr. Berland's testimony.'

Deangelo's Death Sentence Is Disproportionate.

Appellant agrees that proportionality review involves a consideration of the totality of the circumstances in a case and how it compares with other capital cases. However, Deangelo insists that the number of aggravating circumstances is a major part of that question. It is therefore extremely pertinent that this Court has never affirmed a death sentence where "heightened premeditation" is the only aggravating circumstance. It is also important that this Court has affirmed a death sentence based on a single valid aggravating circumstance in only five cases. Four of those cases involved torture-murders, while the other had absolutely no mitigation. See Aranso v. State, 411 So.2d 172 (Fla. 1982); Armstrona v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); and Gardner V. State, 313 So.2d 675 (Fla. 1975).

Dominick Deangelo's crime justifies life imprisonment. The murder of Mary Price was not the most aggravated and unmitigated first-degree murder. In light of the circumstances of the case, the trial court's improper consideration of

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Appellant read with some alarm the Assistant Attorney General's labeling of the trial judge's "extremely liberal" consideration of mitigating circumstances, in that the judge gave equal weight to both statutory and nonstatutory mitigating circumstances. Appellant does not believe that mitigating evidence is necessarily entitled to less weight simply because it is nonstatutory rather than statutory mitigation.

aggravating circumstances, the substantial mitigation found by the trial court as well as the court's improper rejection of unrefuted mitigating evidence, the death penalty is simply unwarranted in Dominick Deangelo's case.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE JURY'S DEATH RECOMMENDATION WAS TAINTED WHEN THE STATE ELICITED AND ARGUED NONSTATUTORY AGGRAVATION.

The State harps on the fact that the prosecutor never used the term "remorse." The State attempts to put form over substance. It is simply a matter of semantics. The prosecutor asked the doctor whether Deangelo cared if he broke the rules. (R727) In his final summation, the prosecutor pointed out that Deangelo:

> Doesn't care about the rules we all live by. They don't mean anything...He doesn't feel bad when he breaks the rules. He doesn't care.... A man who doesn't care about rules, violating rules; doesn't care about other people....

(R750-51) Although the prosecutor may not have used the forbidden word, he certainly was arguing that Dominick Deangelo had no remorse. See Jones v. State, 569 So.2d 1234 (Fla. 1990). Although the trial court did not rely on the impermissible nonstatutory aggravation, the improper evidence and argument tainted the jury's recommendation.

ISSUE ON CROSS APPEAL

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE MURDER WAS HEINOUS, ATROCIOUS, AND CRUEL.

The State takes issue with the trial court's rejection of the aggravating circumstance that the murder was heinous, atrocious, and cruel. In their brief, the State conveniently sets forth the trial court's entire written reasoning in dealing with the evidence of this aggravating circumstance. The trial court did a masterful job in analyzing the physical evidence, the expert testimony, and the lay testimony and applying the precedent set forth by this Court.

Deangelo urges this Court to carefully read the trial court's reasoning in its rejection of the circumstance. It would have been easy for the trial court to conclude that the murder must have been heinous since the victim died as a result of asphyxiation due to strangulation. But the trial court considered the evidence more closely. The trial court focused on the absence of offensive wounds, the lack of evidence that there was a struggle, the presence of enough marijuana in the decedent's system to create a "high," and the likelihood that, at the time she was strangled, the decedent was unconscious as a result of the blow to her head, Taking all these factors into account, and focusing on the issue of consciousness *vel non*, the trial court concluded that the State of Florida had failed to

prove, beyond a reasonable doubt, the existence of this aggravating circumstance.

The real problem with the State's argument on appeal is made abundantly clear when the State writes, "The trial judge also misconstrued Dr. Giles' testimony which was quite clear a victim woudl [sic] not lose consciousness for five minutes and that Mary was rendered unconscious by the blow was only 'possible'." Answer Brief, p. 29. The State then points out that the only common sense conclusion is that Mary Price was fully conscious and aware of her pending death. The State apparently does not understand its burden of proof as far as aggravating circumstances are concerned. The State's own evidence clearly showed that it was "possible" that Mary Price was unconscious prior to her strangulation. This evidence, in and of itself, reveals that the State failed to prove this aggravating circumstance beyond a reasonable doubt.

In concluding that no struggle occurred, the trial court pointed out that the homicide took place within a relatively small mobile home. Neither Deangelo's wife nor any neighbors heard any screams or sounds of a struggle. The State contends that the trial judge ignored the fact that, in his confession, Deangelo said that he and Price were arguing loudly. Deangelo's wife did not hear any yelling. The State overlooks the fact that Deangelo confessed that he strangled Price in an attempt to keep her quiet. He was obviously successful.

The State finds fault with the trial judge for failing

to explain how the absence of defensive wounds in a strangling situation is significant. The trial court obviously concluded that Price's failure to fight back is further evidence that she was unconscious during the attack. This is significant in that it tends to show that she was unaware of the pain or of what was happening to her. The absence of defensive wounds is extremely important. This proves that it is unlikely that Price remained conscious during the attack. She probably never woke up. The preclusion of the defensive wounds indicates that she necessarily lost consciousness almost instantly. See e.g. Hansbroush v. State, 409 So.2d 1081 (Fla. 1987); Nibert V. State, 508 So.2d 1 (Fla. 1987); and Bundy v, State, 471 So.2d 9 (Fla. 1985).

The State points out that the judge's conclusion that Price was rendered unconscious due to a blow to her head is contradicted by Deangelo's statement in which he says he slapped Price only once. (R402) The State wants to believe certain portions of Deangelo's statement where it might help the State's argument. Deangelo wishes that the State would either accept or reject his entire confession. *Falsus in uno, falsus in omnibus.*

In Scott v. State, 494 So.2d 1134 (Fla. 1986), the victim was run over and pinned by the car while Scott spun the wheels thereby pushing the victim down into the sand to suffocate. Since there was no evidence that the victim was conscious at the time, this Court refused to uphold the finding that the murder was heinous, atrocious and cruel. This Court did uphold the circumstance based on other available facts indicating

that the victim was twice beaten and terrorized at two separate locations before finally being murdered. The evidence in Deangelo's case indicates that Price was knocked unconscious by a blow to the head and then strangled while she was still unconscious.

The evidence, even if viewed in the light most favorable to the State, supports the conclusion that Mary Price was unconscious shortly after she was surprised in her sleeping bag by Deangelo. There is no proof offered by the State that she regained consciousness. The absence of defensive wounds indicate the contrary. The evidence presented by the State is just as consistent with the theory that Price remained unconscious, and therefore unaware, throughout the attack. The bruises on her head and the ligature mark around her neck support this conclusion. Rhodes v. State, 547 So.2d 1201 (Fla. 1989) and Herzog v. State, 439 So.2d 1372 (Fla. 1983). Therefore, the murder was not "unnecessarily torturous to the victim" as required by State v. Dixon, 283 So.2d 1 (Fla. 1973) and Tedder v. State, 322 So.2d 908 (Fla. 1975). The thorough and thoughtful analysis and conclusion of the trial court should not be disturbed.

CONCLUSION

WHEREFORE, based upon the cases, authorities, policies, and arguments cited herein and in the Initial Brief, Appellant requests that this Honorable Court grant the following relief:

As to Point I, vacate the death sentence and remand for the imposition of a life sentence without possibility of parole for a minimum term of twenty-five years;

As to Point II, vacate the death sentence and remand for a new penalty phase;

As to Point 111, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, remand for a new penalty phase;

As to Point IV, vacate the death sentence and conviction and remand with instructions to enter a judgment finding Deangelo guilty of second-degree murder and order sentencing thereon;

As to Point V, vacate the death sentence and remand for the imposition of a life sentence or, in the alternative, declare Section 921.141, Florida Statutes (1989), to be unconstitutional;

As to the crass appeal, affirm the trial court's rejection of the aggravating circumstance that the murder was heinous, atrocious, and cruel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Fla. 32114 and mailed to Mr. Dominick Deangelo, #122566, P.O. Box 747, Starke, FL 32091-0747, on this 6th day of April, 1992.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER