IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Appellant,

v. CASE NO. 78,629

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

TABLE OF CONTENTS

TABLE OF CITATIONS

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED WHEN IT FAILED TO GRANT SWEET'S PERSONAL REQUEST TO GO TO TRIAL AND WHEN IT FAILED TO ADEQUATELY INQUIRE WHETHER HE WANTED TO REPRESENT HIMSELF.

The state makes three arguments on this issue: 1) Sweet did not make an unequivocal demand to proceed without counsel. 2) He did not have the ability to waive counsel. 3) In any event, whatever error occurred was harmless.

1. The demand for counsel.

As to the definiteness of Sweet's demand to proceed as his own lawyer, the defendant refers to his Initial Brief at pages 8-10. He also re-emphasizes his reliance on this court's opinion in Hardwick v. State, 521 So.2d 1071 (Fla. 1988) where this court said, "We recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self representation." Id. at 1074.

The only evidence that Sweet wanted to "manipulate the docket" comes from the state. (Appellee's brief at pp. 6-7). There is none that this defendant had some master strategy to waive counsel, represent himself, lose his case and be sentenced to death, and then win the chance on appeal to do it all over again. Sweet is simply not in the same class of defendants as Jones and Waterhouse who repeatedly over an extended period fired their lawyers, demanded money to hire counsel of their choice, refused to cooperate with court appointed counsel, and generally rebuffed the considerable efforts of the trial courts to give the defendants every legal right they were entitled to. Jones v. State, 449 So.2d 253 (Fla. 1984); Waterhouse v. State, Case No. 76,128 (Fla. February 20, 1992) 17 FLW S132. There is no evidence Sweet wanted to manipulate the courts for his own purposes.

2. Ability to waive counsel.

The state argues that even though Sweet was competent, the court could nevertheless deny him his constitutional right to represent himself. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), this court approved the trial court's ruling that the defendant could represent himself in the penalty phase of his trial even though he had presented nothing in mitigation, and had even helped the prosecutor establish his prior record. Though the defendant in that case wanted to die and was determined to get a death sentence, this court held that he could represent himself.

We find no error in the trial judge's

> handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so to permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta [v. California, 422 U.S. 805, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1972). In the field of criminal law, there is no doubt that `death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Id. at 804.

If a defendant who is competent to stand trial is also competent to waive counsel, Muhammad v. State, 494 So.2d 969 (Fla. 1986), then the court should have allowed Sweet to represent himself because there is no evidence he could not be tried. Moreover, if Sweet mistakenly believed the state was unprepared to go to trial, that should have no bearing on whether he could "knowingly and intelligently" relinquish his right to counsel. Faretta, at 835. As the U.S. Supreme Court said in Faretta,

> Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that `he knows what he is doing wand his choice is made with eyes open.'"

Id. at 835.

Here, the court obviously thought Sweet was a fool for wanting to represent himself, and it short circuited any inquiry as required by Faretta and Rule 3.111(d) Fla. R. Crim. P.

The state also argues that the court need not conduct a formal Faretta inquiry where "the record speaks for itself." (Appellee's brief at p. 8) It cites Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988) for that proposition, but in that case no inquiry was required because the defendant (who had had two years of law school training) quoted Faretta to the court with an obvious understanding of what that case held and meant. Although the court did not rule on whether that case was one of the "rare" ones in which the required inquiry could be foregone, it is difficult to fathom how a more thorough examination of the defendant would have revealed more than what he had already told the court.

Finally, on this point the state says it would have been "fundamentally unjust to allow Sweet to go to trial unprepared, without witnesses, and under the delusion that the state had no witnesses." (Appellee's brief at p. 8) The wisdom or folly of foregoing the assistance of counsel, however, is not a consideration the trial court can use in justifying forcing the defendant to go to trial with the assistance of counsel. "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case is to his advantage." Id. at 834. Hamblen, supra. Thus, the fairness of pitting Sweet against a trained lawyer is not the issue. It is whether he knowingly and intelligently could decide whether or not to represent himself. As to that problem, the court made no inquiry.

3. The harmlessness of this error.

The state cites Bundy, supra for the proposition that failing to conduct a proper Faretta inquiry was harmless. In that case, the court let Bundy act as his own lawyer, but the defendant later withdrew his waiver of counsel and accepted the services of a lawyer. Thus, whatever error was created by failing to conduct a proper inquiry became harmless because the court let the defendant represent himself who in turn later asked for the assistance of counsel.

That scenario, of course, does not occur in this case. The court never let Sweet represent himself, and he therefore, never had the opportunity to go to the court and ask for counsel's assistance. If the court's error can be subjected to a harmless error analysis, the mistake certainly was not so here.

Finally, what Sweet would or will do if he wins on this issue is pure speculation. The law, contrary to the state's position on page 9 of its brief, does not require him to allege or show "that, given a new trial, he would proceed pro se."

The court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN ADMITTING EVIDENCE COFER HAD BEEN ROBBED THREE WEEKS BEFORE THE MURDER OF BRYANT AND THAT SWEET MAY HAVE PARTICIPATED IN THE EARLIER CRIME.

The state on page 9 of its brief mentions that the state filed a "factual stipulation with the trial court outlining Mr. Sweet's connections with the June 6, 1990 robbery and the events of June 26 and 27, 1991. (R 240)" Sweet never joined in that stipulation, so it has as much evidentiary value as if Sweet had done the same thing: none.

On page 10 of its brief, as point 7 of its summary of the evidence shown in "the stipulation and shown by the record," the state alleges

> Sweet told Solomon Hansbury (after his arrest) that he thought "Funky Larry" (a robber) would be blamed for the shooting and that he would have killed everyone had he thought he would be arrested. (T 943).

What Sweet thought "Funky Larry" would be blamed for is ambiguous, and it is as likely that he believed "Funky Larry" would be blamed for the robbery, not the murder:

> A. He said--asked me (Solomon Hansbury) did I know Marcine, I told him no. He said that's what he was supposed to be in there for. He said that Marcine and them had house on 3rd Street that he was supposed to have robbed, that was the reason why he was in there. And he asked me something about--he asked me--no, he said-- he didn't ask but he said, I thought Funky Larry was going to get the blame for this. I said I don't know no Funky Larry. So he stopped the conversation and then jumped on to the part about I did all this shit for nothing because if I knew this was going to happened, I would have killed them all.

(T 943).

Sweet apparently thought he was in jail, not for murder, but for the robbery of Cofer weeks earlier. Thus, the defendant thought "Funky Larry" was going to get the blame for the robbery, not the murder as the state says in its brief.

Moreover, it is also unclear what the defendant told Manuella Roberts. At one point in his conversation with her, he said, in a joking manner, that he had had Cofer robbed, that "Funky Larry" had robbed her, and that he had not robbed her at all (T 911-13).

The state seems to characterize Sweet's argument on this issue as one of his being against the admission of all circumstantial evidence. (Appellee's brief at p. 11). Not so. Sweet certainly recognizes the legitimacy of such evidence in Florida courts to prove motive, intent and "other essentially intangible elements of a criminal offense." Id. On the other hand, he recognizes that such evidence also requires special, stringent standards of review. State v. Law, 559 So.2d 187, 188 (Fla. 1989). The admissibility of such evidence, almost by definition, rests exclusively upon the strength of the inferences that can be drawn from it. We see, for example, a flash and hear a noise that sounds like a gun. Although we have not seen a firearm, the reasonable inference drawn from these two pieces of circumstantial evidence is that someone fired a pistol. The same inference cannot, however, be drawn if we were inside of a house and saw someone clutch his chest and fall to the ground and shortly thereafter another person

standing nearby turns and runs away. To conclude that the person on the ground was assaulted by the person now in flight, we would have to first infer that the purported assailant had a gun (which we did not see or hear fired), that he shot the second person, and that the second person was hit by a bullet. Such evidence, however, also gives rise to the alternate explanation that the first person suffered a heart attack when he learned that he had had won the lottery and the second person was running to a nearby house to call for help. Such is the danger, in this case, of admitting evidence of the 6 June robbery. The inferences, as discussed on pages 18-20 of Sweet's Initial Brief, that have to be accepted before the final inference (that the robbery provided the motive for Sweet to shoot Bryant) give rise to the substantial possibility that the jury reached their verdict through speculation rather than an analysis of the evidence. Voelker v. Combined Insurance Co. of America, 73 So.2d 403, 407 (Fla. 1954). Thus, this court should follow the law it has earlier established and consistently followed, that a pyramiding of inferences drawn from circumstantial evidence cannot support a resulting conviction.

On page 12 of its brief, the state alleges "Mr. Sweet says that no inferences can be drawn from the June 6 robbery because he was not charged or convicted for that offense." Sweet never said that or anything similar to it. The state also says Sweet can take no comfort in Cofer's failure to identify him when the met on the street on 26 June. It supports this conclusion by

noting that "Cofer's identification of anyone could result in the arrest of everyone. (Appellee's brief at p. 12) That, of course, assumes Sweet knew Cofer could recognize those who had robbed her, and they in turn would tell the police of his supposed involvement. That the police had arrested no one severely weakens the strength of this pyramid of inferences, and we must speculate that anyone arrested for that offense would automatically have linked Sweet with the robbery. That Cofer did not identify Sweet as one of her assailants to the police officer who was standing near her provides the fatal nudge that causes the collapse of the state's carefully stacked inferences.[1]

On the same page the state also argues that the only reason Cofer could have had for going to the police was to report the robbery. After all she was a cocaine dealer whom we can logically infer would eschew any contact with the police. This, of course, assumes the police only talk to people when they report a crime. To the contrary, and particularly in drug cases, the police often actively investigate leads and question suspects. Sweet could, with more logic than the state mustered

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[1]The state also says Sweet admitted to Solomon Hansbury that he "wanted 'Funky Larry' (a known participant in the June 6 robbery) to take the fall for any shooting of Ms. Cofer. (Appellee's brief at p 13.) As argued above, the appellant rejects this interpretation of Hansbury's testimony. If Sweet wanted Larry to take the blame for any crime, it was for the robbery, not the subsequent murder.

to support its hindsight inferences, have believed the police were investigating Cofer and her cocaine sales.

On page 13 of its brief, the state argues that from the several facts "we know" (of which the direct admissions against penal interest we do not know) "[l]ittle, if any, `stacking' was necessary." But there are to many inferences to link what "we know" to draw a conclusion about why Sweet shot Bryant. For example, although "we know" Sweet saw Cofer talking with the police, we have to infer that she was talking with them about the robbery. There is no basis for that assumption however. Likewise, although "we know" three men robbed Cofer, there is no evidence, Sweet knew Cofer had identified any of them, and more specifically, there is no evidence which would have reasonably led him to believe she had even reported the crime and named him as one of her assailants. The inferences required to lace the facts "we know" together to justify admitting evidence of the June 6 robbery are too many.

Finally, the state misunderstands Sweet's harmless error argument when it says on page 13 of its brief that "Sweet contends that proof of motive should not have been permitted because it prejudiced him during the penalty phase." Sweet was not saying that. His argument was that, <u>if</u> this court finds the trial court erroneously admitted the evidence of the 6 June robbery, it may nevertheless conclude it was harmless. As to that possibility, Sweet argued that whatever harmlessness such evidence may have had in the guilt portion of his trial, it

certainly was not so in the penalty phase. See, Burr v. State, 518 So.2d 903 (Fla. 1988) (Barkett, dissenting.)

This court should reverse the trial court's judgment and sentence and remand for resentencing.

ISSUE III

THE COURT ERRED IN FINDING THAT SWEET COMMITTED THE MURDER OF FELICIA BRYANT IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

I suppose that if this court did as the state does in this case, and dissects the findings of fact supporting the finding that the murder was committed in a cold, calculated, and premeditated manner, that cases could be found to support each of the so identified facts. Thus, for example, the state argues that this aggravating factor applies because "Sweet procured a gun and a mask." (Appellee's brief at p. 14) This approach, at least from the state's perspective, makes good sense because cases can be found supporting a finding of this aggravating factor which involve that isolated fact. For example, the state cites Lamb v. State, 532 So.2d 1051 (Fla. 1988) to support the above mentioned fact of Sweet procuring a gun and a mask. Ignoring the discrepancy that Lamb secured a "weapon" and not a gun, we nevertheless must acknowledge that that case has few similarities with this one. In Lamb, the defendant and his buddies broke into the victim's home to ransack it. Before entering, Lamb had gotten a weapon of some sort, but once inside he discarded it for another. Piqued at the meager takings from the house, he laid in wait for the victim to return, and when he did, Lamb beat and killed him. What makes this murder particularly cold was the defendant's refusal to let his co-defendants call an ambulance to help the victim.

Lamb thus shows the problem with the state's willingness to parse the totality of the circumstances surrounding this murder into atomized bits and then find law to support finding the cold, calculated aggravator based (apparently) on those individual fragments. Only rarely does one particular fact so clearly indicate the defendant's careful planning and his well thought out design, and in this instance that is not the case. Here, and in general, this court must look to the totality of the circumstances, the cumulative effect of all the evidence, before it can conclude the state has proven this aggravating factor beyond a reasonable doubt. How this analysis works can be seen by this court's analysis of the facts in Jackson v. State, Case No. 75,970 (Fla. April 9, 1992).

In that case, the defendant's estranged wife moved in with some friends, the Washingtons, and Mrs. Washington's two children. She also acquired a new lover named Finney. On the night of the killings, Jackson and Livingston came to the Washington home and the defendant forced his way into his wife's bedroom. Eventually, she and their children were taken to the cab of his truck, and the others, including Finney were held hostage in the camper portion of the truck. Jackson drove by several abandoned cars, eventually stopping at one. Livingston and Jackson ordered the Washingtons, their children and Finney into one of the cars. The adult victims were then shot and the car burned, killing the children.

The trial court found the murders of the children to have been cold, calculated and premeditated, and had this court

parsed the facts as the state did in this case then it would have upheld that conclusion. Afterall, a gun was brought to the crime scenes and used. Everyone was killed to minimize detection (Appellee's brief at p. 14). Jackson had "ample time to consider and plan the assault." Yet, as to the children, this court rejected the trial court's conclusion that their murders were committed in a cold, calculated, and premeditated manner. "There is no reason to conclude that, even if Jackson did intend to burn the children alive, this decision was anything but an afterthought." Id. Thus, this court looks to the totality of the circumstances, and if it supports an explanation for the murder being done in a manner other than cold, calculated and premeditated, then this court must accept it. Geralds v. State, Case No. 75,938 (Fla. April 30, 1992) 17 FLW S268.

Although satisfied that what has been said adequately refutes the state's argument on this issue, appellate counsel lacks the courage to simply rest his reply on this, and must, out of a profound sense of cowardice, reply to the specifics of the state's contention.

As to Sweet's motive (witness elimination), as the state admits, Cofer had not identified Sweet as one of the robbers, and it is reasonable to believe he knew she could not identify him. Afterall, Sweet had seen Cofer with the police earlier that day, and if she thought he was one of her assailants, she would have told the police. That she did nothing other than merely speak to him only confirms the belief that Sweet did not

believe Cofer could not link him with the earlier robbery (T 545).

The state claims that the killing occurred late at night "to minimize the chance of detection" but the court itself destroyed any value to that fact in support of this aggravating factor when it also acknowledged that he knew other people were in Cofer's apartment (R 403-404).

The state attacks Sweet's arguments against applying the cold, calculated aggravating factor on several grounds. In his Initial Brief the defendant said the manner of the killing was haphazard to which the state answers that "There is no nexus between `intent' and `shooting skill' and Sweet cites no authority for the proposition." Certainly, the state would have an easier time proving this aggravating factor if several people were methodically killed. Coleman v. State, Case No. 74,944 (Fla. June 25, 1992); Robinson v. State, 74,945 (Fla. June 25, 1992). Intent, or rather the required careful planning, can be shown by the manner in which the defendant committed a particular killing, and in this case, the random firing of the gun belies any intent or evidences any design to kill in a cold, calculated, and premeditated manner.

The state says that, well, the murder of Felicia Bryant was not entirely haphazard because she was the first one to try to leave the apartment, and Sweet could logically have expected Cofer to have left first, so he shot the first one. (Appellee's Brief at p. 15.) If all people were equally courageous and willing to face danger without flinching that conclusion may

logically follow, but we are not, and it does not. Moreover, Felicia Bryant was a 12 year old child significantly smaller than Cofer, so it is difficult to understand how Sweet could have logically or actually believed the first person in the door to be Cofer.

The state then discounts Sweet's argument that because no one else died this aggravating factor remains inapplicable. The state says that the applicability of this factor "has never been contingent upon the success of the plan." (Appellees brief at p. 16) What the state cannot deny is that except for Felicia Bryant none of the other victims were shot in a life threatening manner. Contrary, for example, to the facts in Coleman and Robinson, supra, none of the victims were laid in a row and then methodically shot. Instead, Sweet burst into the room, sprayed it with bullets, then fled. Thus, that no one died, indicates a frenzied shooting more in accordance with the depraved mind of one guilty of second degree murder than of a defendant who carefully plans to murder a witness.

The state's cite to page 401 of the record (Appellee's brief at 16) that Sweet told Solomon Hansbury that "he expected `Funky Larry' to take the blame for the attack" not only is incorrect, appellate counsel can find no evidence Sweet ever told Hansbury anything alleged in the state's Answer Brief.

If there were 4 people in Cofer's apartment when Sweet burst in, it is hard to figure out how Sweet had insufficient ammunition "to finish the victims" with his loaded six shot revolver. (Appellee's brief at p. 16.)

Finally, despite the state's efforts to deny Sweet's foreknowledge that Mattie Bryant (Felicia's mother) was in Cofer's apartment (Appellee's brief at p. 16), the court found otherwise (R 403-404). Such knowledge undermines the trial court's argument that Sweet chose the time and place to kill Cofer to reduce the likelihood of detection. The court erred in finding that Sweet committed this murder in a cold, calculated, and premeditated manner, and this court should reverse the trial court's sentence and remand for resentencing before a new jury.

ISSUE IV

THE COURT ERRED IN FINDING THAT SWEET COMMITTED THE MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

On page 16 of its brief, the state says "Sweet confesses that the aggravating factor found by the trial court was supported by the evidence and, in particular, the four conclusions drawn from the record by the trial court." It also claims he is making nothing more than a "jury argument" to justify rejecting this aggravating factor.

What the defendant said is that the facts may suggest that Sweet killed Bryant to avoid arrest, but they do not show that this was his dominant motive for committing the murder as required by this court. (Initial Brief at p. 27) Sweet's "jury argument" arises from the circumstantial evidence the state presented and was intended to show that the defendant's motives were either not so clear or not proven beyond a reasonable doubt.

The state also claims Sweet never answered "the central point: Why was Sweet there in the first place?" (Appellee's Brief at p. 17) Sweet did answer that question on page 29 of the Initial Brief. "Before the murder, the defendant had, for several minutes or maybe an hour, been harassing Cofer. He had kicked her door, called out her name, opened and closed her windows, and turned her porch light on and off (T 514)." The shooting, in short, escalated the harassment, tragically as it turned out, but there is no evidence that Sweet deliberately

killed Bryant to silence her from reporting a robbery she had nothing to do with.

Sweet emphasizes this latter point. Felicia Bryant had not been robbed. Cofer had, yet it was the former who was killed not the latter. Of course, everyone assumes some sort of transferred intent theory applies, but does it? If this court has required the state prove that the dominant motive for the killing was witness elimination, how can it bear such a burden if the actual victim was not the intended one, the one who could incriminate the defendant? Of course if the defendant had killed Bryant fully believing he had killed Cofer then application of a transferred intent theory would have merit. In this case, however, Sweet must have known that not only had he not killed Cofer, but his fatal shots had hit someone who knew nothing about the earlier robbery. Thus, although Cofer "presented no threat to the defendant except as a potential witness" (Appellee's brief at p. 17) she was not killed. Bryant was, and she posed no threat to Sweet at all. Thus, this court cannot say that Sweet's dominant motive for killing this girl was to eliminate her as a witness.

Finally, the state rejects Sweet's argument that "the trial judge should have weighed the evidence prior to allowing the state to argue" this aggravating factor to the jury. The defendant's argument is nothing more than a penalty phase motion for a Judgment of Acquittal regarding this aggravating factor. If the facts, when considered in the light most favorable to the state, do not show, as they did not here, that

the murder was for the dominant reason to eliminate Felicia Bryant as a witness to some earlier crime, then the court should refuse to instruct the jury that it can consider it in justifying a sentence of death. While this may be an "unusual proposition," it is so because it has never been suggested before. Nevertheless, consideration of the arguable aggravating factors in terms of a Motion for a Judgment of Acquittal would sharpen the focus of the relevant aggravation and eliminate those which have no legal support. It would also tend to reduce the number of reversals by this court since the trial court would presumably have a legal analysis and would have spotted those aggravators which it and the jury should not legally consider.

This court, accordingly, should reverse the trial court's sentence and remand for a new sentencing hearing before a new jury.

CONCLUSION

Based on the arguments presented here, the appellant, William Sweet, respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, reverse the trial court's sentence and remand for a new sentencing hearing before a jury, or reverse the trial court's life sentences and order they be served concurrently.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

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, WILLIAM EARL SWEET, #100063 Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 7th day of July, 1992.

DAVID A. DAVIS