IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY

APPELLANT

v. Case No: 78,934

STATE OF FLORIDA

APPELLEE

_____/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
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ATTORNEYS FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

v. Case No. 78,934

STATE OF FLORIDA,

Appellee.
_____/

STATEMENT OF THE CASE AND FACTS

Appellant will rely on the Statement of the Case and Facts as contained in the initial brief.

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING THE HOMICIDE OF APPELLANT'S STEP-SON WHICH OCCURRED SUBSEQUENT TO THE HOMICIDE FOR WHICH APPELLANT WAS ON TRIAL.

Appellee's contention is that evidence concerning the subsequent homicide of appellant's step-son was relevant therefore it was admissible. While it is true that relevancy is the test for determining admissibility, the rules of evidence do not allow for the admission of all relevant evidence. see Florida Statutes 90.402 and 90.403.

Appellant does not admit the evidence in question is relevant. Appellant's position is, assuming for the sake of argument that the murder of appellant's stepson Eugene was relevant, it still had to be relevant to a material fact at issue. During his opening argument defense counsel conceded the fact that appellant was at the victim's house and had stabbed her, but advanced the defense theories appellant did so either in self defense or in a blind rage in response to the victim's attack upon him. Since there was no bona fide controversy over the fact that the evidence was supposedly relevant to prove, ie., that appellant was the person who stabbed the victim, its probative value necessarily decreased inversely proportional to the increase in its prejudicial effect. Pursuant to 90.403 even relevant evidence is inadmissible where the prejudice created far outweighs its probative value.

Appellee argues that necessity has never been established as an essential prerequisite to admissibility and that relevancy is

the sole test. Appellee cites, Bryan v. State, 533 So. 2d 744 (Fla. 1988) to substantiate this assertion. While this court did state that necessity has never been established as an essential requisite to admissibility and relevancy was the true test, this court also held:

> "In the case at hand, the evidence surrounding the bank robbery was relevant to the issue of ownership and possession of the murder weapon by appellant. The state was able to match the registration number of the murder weapon to a shotgun which appellant had pawned and redeemed prior to the bank robbery. It was also able to show that the residue from the modification of the murder weapon had been seized in appellant's home immediately following the bank robbery. Further it was able to show that appellant used a sawed-off shotgun similar in appearance to the murder weapon in the bank robbery. Only on this last point do we find error. **Although the picture of appellant with a sawed-off shotgun committing a bank robbery was relevant to possession of the murder weapon prior to the crimes here, we believe that any evidence of the bank robbery or the picture's probative value was substantially outweighed by the danger of unfair prejudice. section 90.403, Fla.Stat.(1983). The state had a plethora of other evidence showing that appellant owned and possessed the murder weapon prior to, during, and following the murder here. Introducing the picture of the bank robbery added little to this evidence but unfair prejudice."**

The prejudice generated by the evidence of Eugene's demise at the hands of appellant is indisputably great. There is probably nothing else that could have created as much prejudice or animosity toward appellant. While appellant would agree with the general proposition that most relevant evidence is prejudicial to the defendant, this should be because the evidence establishes his guilt, not because the evidence in itself is inherently prejudicial.

Appellee further contends the evidence concerning Eugene's

abduction and subsequent demise establishes more than appellant's mere presence at the scene. Appellee claims the act of covering up the victim's body and removing the only witness to the crime shows guilty knowledge and was relevant to rebut appellant's self defense claim and establish his mental condition at the time of the murder. First, appellant disputes appellee's claim that Eugene actually witnessed the homicide of his mother. The evidence only shows he was in house at the time. In appellant's statement to the police, he said Eugene was in the bedroom when the murder occurred. There was no physical evidence or direct evidence to contradict it. If Eugene had already seen appellant kill his mother, why would appellant take the time and trouble to cover her body or why would Eugene, by all accounts, have gone willingly with appellant?

Secondly, appellant challenges appellee's contention that John Henry's actions were inconsistent with self defense. This presupposes that everyone's actions after a certain event will be the same or that their actions are unambiguous. For example, this court recently did away with the instruction concerning flight from the scene, in the recent case of Fenelon v. State, 594 So. 2d 292 (Fla. 1992). This court found the natural difficulty in the flight instruction was determining whether "leaving" truly demonstrated the defendant's consciousness of guilt. It has been noted in more than one instance that evidence of flight standing alone can be equally consistent with innocence as it is with guilt. Lefevre v. State, 585 So. 2d 457 (Fla. 1st DCA 1991). In

addition, appellant's actions are not necessarily inconsistent with a second degree murder theory.

Third, appellee argues that appellant's actions went toward proving his mental condition at the time of the murder, ie. premeditation. However, appellant fails to see how appellant's mental state subsequent to the homicide is necessarily indicative of his mental state before and during the offense. Premeditation by its very definition [1] refers to one's state of mind beforehand. In another vein, this court has held that whatever the defendant does after the victim's death, has no bearing whatsoever on whether the offense was heinous, atrocious or cruel. Jackson v. State, 451 So. 2d 458 (Fla. 1984).

There was no genuine controversy about who had killed Suzanne Henry. Without mentioning the subsequent homicide, the state still could have brought out the facts the blue-green Chevy was seen in front of Suzanne's house on December 22nd and was driven away by an unidentified person; when arrested, appellant had blood on his clothing which he had attempted to wash out;that appellant subsequently lead the authorities to the blue-green Chevy which was stuck in the mud in an area with thick undergrowth; and appellant had admitted to the police stabbing Suzanne and disposing of the knife in the area where the car was found.

The only material fact truly at issue, which the subsequent

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[1] Premeditation: "A prior determination to do an act." Black's Law Dictionary 5th edition

homicide bore any relevancy to, was the matter of the scratches on appellant's hands. Appellant claimed they were inflicted by Suzanne. The state, on the other hand, maintained they were scratches like one might get from shrubs or other woody vegetation. Their theory was that appellant had gotten the scratches when he disposed of Eugene, the car and the murder weapon, as that area contained thick undergrowth. However, like in the Bryan, id. case, the state could have presented the evidence showing appellant disposed of the vehicle and the murder weapon in the area with thick undergrowth after Suzanne's murder. Introducing the fact appellant disposed of Eugene, too by violent means, added nothing but undue prejudice.

Appellee argues that even if it were error to admit the evidence concerning Eugene's homicide, the admission constituted nothing more than harmless error. Appellee's argument is that in its opinion there is simply no support for appellant's claim that "that this heinous murder was committed in order to defend himself." What appellee seems to ignore, is that even rejecting appellant's claim of self-defense, considering appellant and Suzanne Henry's then current relationship and prior history, these facts could have easily sustained a verdict for second degree murder.[2] It cannot be shown beyond a reasonable doubt that the jury's awareness of Eugene's murder did not have any impact on their verdict. Knowledge of his subsequent demise at

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[2] The state itself allowed appellant to plead to manslaughter for the stabbing of his first wife under similar circumstances.

appellant's hands made it totally impossible for the jury to logically and dispassionately determine appellant's guilt or innocence of the instant offense.

ISSUE II

DURING THE PENALTY PHASE PORTION THE TRIAL COURT ERRED BY ALLOWING THE STATE TO USE A TRANSCRIPT OF THE PRIOR TRIAL TESTIMONY OF DEBBIE FULLER AND ALLOWING DR. WOOD TO TESTIFY FROM AN AUTOPSY REPORT PREPARED BY DR. SHINNER CONCERNING HIS FINDINGS IN THE DEATH OF APPELLANT'S FIRST WIFE.

Appellant will rely on the argument as contained in his initial brief.

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF HOMICIDE DURING THE COMMISSION OF A FELONY, BECAUSE THE EVIDENCE TO SUPPORT THE FACTOR WAS TOTALLY INSUFFICIENT.

Appellant will rely on the argument as contained in his initial brief.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO CONSIDER ALL NON-STATUTORY MITIGATING FACTORS FOR WHICH EVIDENCE WAS PRESENTED, WHEN IT IMPOSED SENTENCE.

Appellee's answer to appellant's contention that the trial court failed to consider all nonstatutory mitigating factors for which evidence was presented is: 1) even if the court did not address each of the non-statutory mitigating circumstances urged by appellant, its failure to do so was harmless error and 2) that it is clear beyond a reasonable doubt that the judge knew he had to consider each, that he did so and he would have still imposed the same sentence even if those matters had been specifically addressed in his sentencing order.

This court has recently reaffirmed its decisions in Rogers v. State, 511 So. 2d 526 (Fla. 1987); Campbell v. State, 571 So. 2d 415 (Fla. 1990) holding that the trial court in any penalty phase must expressly find, consider and weigh in its written sentencing order all mitigating evidence urged by the defendant, both statutory and non-statutory which is apparent anywhere in the record. see Ellis v. State, 18 Fla. L. Weekly. S417 (Fla. July 1, 1993) Case No. 75,813. There is nothing in any of these cases allowing the trial court to limit its considerations to those mitigating circumstances specifically argued by defense counsel as appellee appears to suggest. To the contrary, this court stated that the trial court must consider any mitigating factors made manifest at any point during the proceedings. Appellant suggests that it requires a leap of faith to assume

that the trial court actually did consider those mitigating circumstances which were not addressed in its sentencing order. Obviously this is the reason why this court requires trial court to specifically address each and every mitigating circumstance for which the defendant has presented evidence. While the trial court may choose not to give the circumstance(s) the weight appellant feels it should be accorded, it cannot discount it entirely.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS OR CRUEL WHEN THE EVIDENCE OF THAT AGGRAVATING FACTOR WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

In response to appellee's argument that appellant is asking this court to re-weigh the evidence, appellant states that it is clearly evident that from the facts presented in the record herein, it could be concluded the victim immediately became unconscious and died quickly or she suffered both extreme mental and physical torture over a period of ten minutes or more before she finally expired. What the evidence does not do, is establish beyond a reasonable doubt the existence of the aggravating factor.

Appellant would call to this court's attention a point not mentioned in appellant's initial brief. The trial court in its sentencing order cited as part of its rationale for finding that the offense was heinous, atrocious, or cruel that appellant for the second time in ten years had stabbed his wife to death in front of her child. Furthermore, appellant had covered the victim's still living body with a rug and then placed an ashtray with a cigarette on top. The court also found it cruel for the victim to be aware she was being killed in front of her child.

The error in these conclusions is that the evidence does not support them to the exclusion of a reasonable doubt. There was no direct evidence that appellant had actually stabbed the victim to death in front of her child. Appellant made no such statements in his confession to the police. To the contrary,

appellant stated he had covered up the victim so that her son would not see her body. It is questionable whether Eugene, the victim's son, would have gone apparently willingly enough with appellant if he had actually seen appellant repeatedly stab his mother to death. In addition, the evidence presented did not prove nor disprove that the victim was still alive when appellant covered up her body.

Most importantly, in other cases this court has held that whatever the defendant does after the victim is unconscious or dead has no bearing upon whether the offense was heinous, atrocious or cruel. see Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Jackson v. State, 451 So. 2d 458 (Fla. 1984) Moreover, whatever appellant may have done to another victim some ten years earlier, although similar in nature, has no application to the instant case in determining the existence of heinous, atrocious or cruel. If it did, appellant could and would argue that this constituted improper doubling of aggravating factors as the murder of appellant's first wife had already been found to be the aggravating factor of commission of a prior violent felony.

ISSUE VI

BASED UPON PROPORTIONALITY, THIS COURT SHOULD REDUCE APPELLANT'S SENTENCE TO ONE OF LIFE IMPRISONMENT.

Appellant cited Justice Barkett's dissenting/concurring opinion in Porter v. State, 564 So. 2d 1060 (Fla. 1990), not because the main opinion Porter, id. supports appellant's position, [it doesn't] but because it points out this court's pattern of treating domestic-disputes/lovers' quarrels homicides differently from other homicides. Her conclusion is that a long-standing love/hate relationship between the defendant and the victim is a mitigating factor of such overwhelming weight, it can and does outweigh almost any and all aggravating factors. Here the trial judge chose to accord it no weight whatsoever.

The state's position is that appellant and Suzanne Henry had not had any confrontations for several weeks to several months prior to the homicide, therefore, this was not a case of "passionate obsession". However, this point of view ignores the fact of the long-standing inability of appellant and Suzanne to get along whenever they got together. While Suzanne may have been in her own home minding her own business when appellant appeared, on the other hand, it doesn't appear appellant came with a weapon and the intent to do her in. It does appear that the simmering animosities between the two got the best of both appellant and Suzanne leading to an altercation and her subsequent demise at appellant's hands.

Appellant is not suggesting mitigation exists solely because

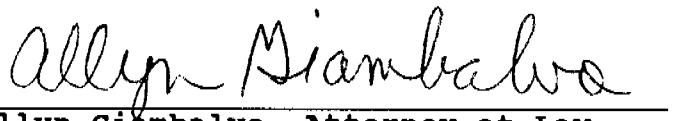
he and the victim had a legal relationship. The legal aspect of their relationship is irrelevant. The same would hold true even if they were not or never had been married. The mitigation exists because of the turbulent nature of their entire relationship.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully asks this Honorable Court to vacate his conviction for first-degree murder and remand the case for a new trial, or to reduce his sentence of death to a sentence of life imprisonment, or in the alternative, to grant him a new penalty phase proceeding before a new jury, or to order a new sentencing hearing before the judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Candace Sabella, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, FL 33607, and to John Ruthell Henry, Inmate No: 053105, Florida State Prison, P.O. Box 747, Starke, FL 32091 on November 19, 1993.



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