IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT KNOWLES,

Appellant,

v. CASE NO. 79,644

STATE OF FLORIDA,

Appellee.

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

INITIAL 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

STATUTES

IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT KNOWLES,	:	
Appellant,	:	
v.	:	CASE NO. 79,644
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Randy Knowles is the appellant in this capital case. The record on appeal consists of 14 volumes and references to either the record or the transcripts will be by the usual "T" followed by the page number.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Nassau County on July 24, 1990 charged Randy Knowles with two counts of first degree murder (T 1907) to which he pled not guilty. Several pretrial motions, notices, or orders relevant to this appeal were later filed:

1. Motion to prohibit argument and/or instructions concerning first degree felony murder (T 1954). Denied (T 120).

2. Motion for additional peremptory challenges (T 2037). Denied (T 524, 583).

3. Notice of waiver of mitigating circumstance 921.141(6)(a) (T 120).

4. Five orders appointing different mental health experts to examine Knowles (T 2113, 2118, 2124, 2153, 2154).

5. Notice of intent to rely on insanity defense (T 2148).

6. Motion in limine to prohibit certain testimony from Walter Johnson (T 2214). Denied (T 129).

7. Motion for special penalty phase instructions (T 2341-64). Denied (T 1722).

Knowles proceeded to trial before Judge William Parsons and was found guilty as charged on both counts (T 2335-2336). The jury also recommended a death sentence for both murders, and the court followed those recommendations and sentenced the defendant to death for each murder (T 2387). In aggravation, the court found:

1. As to count I:

   a. Knowles had a prior conviction for murder (The count II murder.)

b. He committed the murder to avoid lawful arrest.

c. He committed the murder during the course of a robbery.

2. As to count II:

Knowles had a prior conviction for murder. (The count I murder.) (T2414-2417)

The court found no statutory mitigation, but it "considered the testimony presented indicating that the defendant, . . ., had a limited education, had on occasion been voluntarily intoxicated on drugs and alcohol, had two failed marriages, has a low average intelligence, has a poor memory, had inconsistent work habits, and loved his father." (T 2413)

Knowles filed a Motion for New Trial, which the court denied (2380, 2392). This appeal follows.

STATEMENT OF THE FACTS

By 5:30 in the afternoon of July 13, 1991 Randy Knowles was drunk (T 1056). That was not particularly unusual for this 38 year old man, but this day, he appeared worse than he had ever been, and the mother of a drinking buddy of his said that at 5 p.m. he would not respond to her when she told him he had to leave her home; instead he stared into space, oblivious to what she had said (T 1071-72). As she testified at trial, "He did not say anything to me. He was acting like he was completely gone. He just sat there and stared at me." (T 1072)

About 11 a.m., Knowles and Earl Wingate bought a case of beer and returned home to drink it and play cards with Knowles' 77 year old father with whom he lived (T 1032). Later he accompanied Wingate to a store where he bought a .22 caliber rifle and watched as he shot some beer bottles (T 1034, 1036). During this time, and throughout the day, Knowles drank beer and "huffed" toulene, a lacquer thinner type liquid (T 1034). Knowles would buy it by the gallon, pour some on a rag and then inhale the fumes (T 931). The effect was euphoric with the high lasting for about 10 minutes (T 933). Knowles was addicted to the stuff and had been since he was 15 or 16 (T 930), and his highs could last for hours during which time he would have visual and auditory hallucinations and would black out and not remember what happened (T 937, 1025, 1242, 1457-58). Time, as the defendant said, would go by quick

(T 932). Although he could go through about a gallon each week, on the 13th he only had a quart can, which he shared with his friend (T 1033).

As mentioned, by 5 p.m. he was in terrible shape and after he had wandered home he got a .22 caliber semiautomatic rifle and went to the trailer next door. Inside, ten year old Carrie Woods and her friend were preparing for her friend's birthday party (T 657). As they danced to the music on a video, Knowles appeared on the front porch and opened the storm window door (T 661). He looked "like he was mad " and pointed the gun at Woods' friend (T 661). As he stood there, he pulled his head back then shot Carrie Woods three times in her arm (T 663, 666, 814). The bullets went through her arm and one of them entered her body, puncturing a lung and her aorta (T 814). She died a short time later.

Knowles left the trailer and walked backed to where he lived. His father, who apparently was unaware of what had just happened, got into the front seat of his pickup truck. Knowles talked with him and sometime during their conversation said "No you won't." (T 702) Randy then shot his father twice, with one bullet entering his head and the second, a glancing non-fatal wound, entering the neck (T 830, 834).

Knowles pulled his father's body from the truck, got in, and drove away looking scared (T 721). About five hours later, he stopped at a convenience store and got some gas and a twelve pack of beer (T 844-45). He did not have any money, but he gave the attendant his driver's license, told him he would pay

for the gas and beer later, and said "Rehabilitation made me do what I did tonight." (T 846)

Knowles headed south and sometime during the night he sold the rifle (T 945). He also picked up a girl and they talked and had sex until the morning (T 944-45). He dropped her off near where she lived, and he continued south eventually ending up at a friend's house near Mulberry (a small community about 40 miles east of Tampa) about 10 a.m. (T 867). "He looked rough. He was shaky. He was haggard" (T 867-68). The friend, Glenn Roberson, asked "Damn boy, what's wrong with you. . . Did you kill someone?" (T 867) Knowles admitted that he had, that he had "kicked in a trailer door and "shot a bunch of mother fuckers." (T 867) He had even shot one of them in his truck and he thought one of them "might have been daddy" (T 868).

Knowles did not know if police were looking for him, and he asked Roberson to find out. Knowles eventually called the Nassau County Sheriff's office, but when they stalled, he hung up (T 876-77). Knowles went to sleep and Roberson called the local police who came to his house and arrested the defendant (T 893).

By July 1991, Knowles was 38 years old (T 925). He had only a borderline intelligence and had dropped out of school in the 7th grade, having probably earned mostly Ds. (T 926) The longest he had ever held a job was four or five years, and most of the time he had been employed as a construction helper of one sort or the other (T 928).

When he was 14 or 15, he began drinking "moonshine" and within a year he started "huffing" lacquer thinner (T 928-30). He would often start drinking at 5 or 6 in the morning and continue all day (T 929). He soon changed to "toulene" because it gave him a better high (T 930). During the next several years, he also became an alcoholic, and by 1991, he would combine his drinking and huffing. He would use a gallon of toulene a week, having purchased it for about eight dollars at a local hardware store. Likewise, he would drink beer by the case (T 929).

The highs from huffing typically lasted a short while, usually about 10 minutes, but as mentioned, Knowles by July 1991, used this inhalant so much and so often that he would be high all day, during which he would hallucinate and have memory blackouts (T 931-32, 967). The last thing he remembered on 13 July was sitting down with a friend to huff some toulene in the morning (T 944). He next remembered the girl waking him (T 944).

This abuse had a cost, and one of the reasons Knowles used toulene was the price he paid when the high was over. He would get headaches, and "if you been on it a long time, sick. You get sick off it. Belly, head, and everything. You get where you have to have it. . . . You get back on it to kill the

pain." (T 933) By July, Knowles was taking "Goody Powders," a headache remedy, by the boxful to numb the pain (T 934).[1] He was also vomiting blood (T 938), his arms would go to sleep "all the time," he had a "fine motor tremor indicating an atrophying of the muscles (T 939, 1091). Not surprising, each of the five mental health experts who examined Knowles after his arrest found him to be brain damaged (T 1108, 1244, 1329, 1452, 1500), and the neuropsychologist that examined him said there was "significant evidence of disruption in brain function, higher brain function, of an organic type," which was chronic (T 1108, 1110).

---

[1]Several empty gallon cans of toulene were found in the woods behind the trailer Knowles lived in (T 1209). A hundred empty Goody Powder wrappers were found near the trailer (T 1210).

SUMMARY OF THE ARGUMENT

Knowles presents four guilt phases issues and nine penalty phase questions for this court to resolve. The first issue involves the court's refusal to excuse for cause two prospective jurors. The first, a Mrs. Smith, did not believe she could fairly determine Knowles' guilt or innocence because she taught small children and had recently become a mother. She also did not accept the insanity defense as being valid, believing instead that lawyers had claimed their clients were insane when they really were not. Mr. Griffis, another prospective juror, also said he could not be fair because he had two daughters, although he said he could probably put aside his feelings.

Such responses from Mrs. Smith and Mr. Griffis raised a reasonable doubt about their ability to be impartial in this case. Doubts about Mrs. Smith's and Mr. Griffis' fairness arise from their understandable sympathy for the girl who had been killed and her family. Smith's objectivity was further weakened by her unambiguous inability to accept an insanity defense as legitimate. Griffis' conditional ability to be fair similarly meant he should have been excused for cause.

During the presentation of the state's case, Wayne Johnson testified that Knowles had told him weeks before the killing that Knowles in essence said that at some unspecified time in the future he was going to kill his father. Another witness, Earl Fagan told the jury that two months before the homicides, the defendant had told him that he might "lose it" someday and

start shooting people. As part of his case, Knowles took the stand and denied making those statements. On cross-examination, the prosecutor asked him if he thought the state's witnesses were lying, and if so, why. The court, over defense objection, permitted the questions and answers, but such was error because such inquiry invaded the province of the jury. The question also assumed either Knowles or the state witnesses were lying. In light of the defendant's acknowledged memory problems, everyone could have been telling the truth. There was, in short, no evidence Knowles knew either witness was lying.

More fundamentally, the court should not have allowed Fagan's or Johnson's testimony about what Knowles told them he planned to do at some unspecified time in the future. He made one comment months before and the other about six weeks before the shootings. What he said was too remote in time to have much probative value of Knowles' intent when he shot Carrie Woods and his father and their prejudicial value outweighed any relevance they had.

The state presented an insufficient amount of evidence Knowles had the requisite amount of premeditation to be guilty of first degree murder. This becomes evident from analyzing various factors this court has identified as valuable in determining whether a defendant had the requisite intent when he committed a homicide. Examining the facts in light of those factors shows that Knowles committed only second degree murders.

In supporting a death sentence for the defendant's murder of his father, the court found that Knowles had committed the murder to avoid lawful arrest. The only fact it found to support that finding was that he had stolen his father's truck immediately after killing Carrie Woods. That evidence, however, does not show that the defendant's dominant motive for killing his father was to avoid lawful arrest. Why he took the truck is, at best ambivalent, and it does not in any event establish beyond a reasonable doubt that he killed his father primarily to flee.

The court also justified a death sentence for the defendant's murder of his father because he killed him during the course of a robbery. The robbery was the taking of the truck. There is an insufficient amount of evidence to show Knowles stole his father's truck. That is, the uncontroverted evidence showed that the defendant had frequently used the vehicle, so when he killed his father, he did not do so during the course of taking something he had no right to use. There was, in short, no robbery because Knowles did not take the property of another.

Accordingly, if there was no robbery, the court erred in instructing the jury that it could find the defendant guilty of his father under a felony murder theory.

The court found as an aggravating factor in the murder of Carrie Woods that Randy Knowles had a "prior" conviction for the first degree murder of his father, Alfred Knowles. It also found as an aggravating factor in the murder of Alfred Knowles

that the defendant had a "prior" conviction for the first degree murder of Carrie Woods. Applying the aggravating factor, that "the defendant was previously convicted of another capital felony" Section 921.141(5)(b) Fla. Stat. (1990) to both murders was error because the murder arose out of the same episode and did not involve "separate victims" as this court has used that phrase in discussing issues surrounding this aggravating factor.

As part of its closing argument during the penalty phase of Knowles' trial, the state, over defense objection, told that jury 1) that even though the defense could argue anything in mitigation, the state did not have a similar freedom to present anything in aggravation. 2) That Knowles' use of alcohol and toulene caused his mother to become mentally ill, and 3) the defendant repeatedly showed a lack of remorse for the murders he committed. These arguments must have had a powerful affect on the jury's recommendation, yet the court should not have allowed it. They were improper because there was no evidence linking, in any manner, the defendant's drug and alcohol abuse to his mother's mental collapse. This court has also held that remorse is not a valid consideration in justifying any aggravating factor. It has also disapproved of comments made in closing argument that the defendant had not shown any remorse.

Under a proportionality review, Knowles' death sentences cannot stand. He attacked all of the aggravation, and it was, in any event not particularly compelling. Moreover, the

defendant's virtual lifelong addiction to alcohol and paint thinner as well as his not surprising low intellect strongly mitigate a death sentence.

At no point during this trial did the state or the court ever tell the jury that their recommendation would receive great weight by the sentencing court. Failure to tell them that, as the defendant requested, was error because it left them to speculate about the value of their recommendation, and the jury could very well have recommended death, not so much with the conviction that Knowles deserved to die, but as a signal of protest of what the defendant had done and their understandable total revulsion at the murders. Because the court never adequately stressed to the jury the importance of their decision, their recommendation lacks the heightened assurances of reliability that it responsibly discharged it duty.

Knowles presented an abundance of evidence, which the trial court virtually ignored, that his ability to control his conduct was significantly impaired as defined in section 921.141(6)(b). This included the unrefuted evidence of his chronic alcoholism and toulene addiction, his low intelligence, and his brain damage. He also presented evidence that only minutes before the shootings he was so drunk that he was oblivious to his surroundings.

The court also failed to "expressly evaluate" the evidence Knolwes presented as nonstatutory mitigation, and all it did was to merely list it. Failing to do so indicates that it did

not engage in the required character analysis of the defendant, and that failure unconstitutionally skewed the results in favor of a death sentence.

Finally, the court instructed the jury that death was the appropriate sentence if the mitigation did not outweigh the aggravation. That was wrong because the nine jurors who recommended death could have done so because the mitigation and aggravation had equal weight. That is not the law in Florida because the aggravation must outweigh the mitigation, the implication being that if they do not life is the appropriate sentence. What the court told the jury was the opposite: if the mitigation did not outweigh the aggravation, death should be recommended.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING KNOWLES' CAUSE CHALLENGE OF TWO PROSPECTIVE JURORS, AND IT COMPOUNDED THAT ERROR BY REFUSING TO GIVE THE DEFENDANT MORE PEREMPTORY CHALLENGES AS HE REQUESTED, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY.

During voir dire, counsel for Knowles asked the prospective jurors about the insanity defense and their views regarding the death penalty. In particular, prospective jurors Smith and Griffis responded as follows:

> MR. COFER [defense counsel]: Okay. Do you feel as though because you teach smaller children or you have a small child that it would be difficult for you to sit on the jury where your are dealing with the death of a child?
>
> MS. SMITH: Yes, I think it would be.
>
> MR. COFER: . . . Do you feel as though you would put aside any feelings of sympathy and the like when viewing the photographs and be a fair and impartial juror, or would you have difficulty doing that?
>
> MS. SMITH: I don't think that... I think I would be... I am a new mother. I have to teach school. I don't think that I should ...I do... I would have strong opinions of it. I think it would be... I don't think it would be fair.
>
> MR. COFER: Okay. I will get into that same question with others. Mr. Griffis, I think you indicated earlier out there that you knew Carrie Woods' family?
>
> MR. GRIFFIS: I knew her father.
>
> MR. COFER: Have you had contact with him since the death of his daughter?
>
> MR. GRIFFIS: No. I don't know him well.

He bought some property from my parents.

MR. COFER: Do you feel as though, because of your relationship with him or his acquaintanceship, that you would have difficulty in judging the guilt or innocence or the potential guilt of a man charged with killing his daughter.

MR. GRIFFIS: Not for that reason.

MR. COFER: You have daughters?

MR. GRIFFIS: Because I have two daughters.

MR. COFER: It would be difficult for you to be fair and impartial?

MR. GRIFFIS: I believe it would, yes, sir.

(T 260-61).

Defense counsel, with a surprising bluntness, asked the jury about an insanity defense with the following response from Ms. Smith:

MR. COFER: Some people in our society have a knee-jerk reaction to [an insanity defense]. If you are one of those people right now, now is the time to be straight with me on it. Mrs. Smith.

MS. SMITH: I would have to agree with what she said. I feel like that's a big defense, and a lot of times it is not... I don't feel that is is truthful. It is... I have read in many cases that is has not been the case, but that was what the defense has built their case on. And that's not right.

(T 279-80).

Later, regarding the pre-trial publicity in the case, counsel asked:

MR. COFER: Do you feel as though you have formulated any preconceived notions about the case before coming down here?

MR. GRIFFIS: Having two daughters, I would

be lying if I said I didn't.

* * *

MR. COFER: Do you feel that you could put aside your feelings about the fact that there is a child victim in this case and decide a verdict?

MR. GRIFFIS: I am fairly open minded. I probably could.

MR. COFER: Probably could?

MR. GRIFFIS: Yes, sir.

(T 365-66)[2]

Counsel sought to excuse Ms. Smith and Mr. Griffis for cause (T 379-81). The court denied both cause challenges, saying with regard to Ms. Smith that "what she was doing is stating what everyone else feels." (T 380) As to Mr. Griffis, the court said, "I don't find that his concerns on his position rise to the level of a challenge for cause." (T 381)

Counsel later exhausted his peremptory challenges and requested more, citing the need for such arising in part because he had had to use two of his ten to excuse Ms. Smith and Mr. Griffis (T 523). The court denied that request, and after additional jurors were questioned, counsel renewed his request for more peremptory challenges, but the court refused it (T 583). The court erred in denying the additional challenges, and it should have excused Ms. Smith and Mr.

---

[2]If the truck was the father's and he had let his son use it, there was no evidence he had withdrawn his permission for him to drive it.

Griffis for cause, although the reasons are different for the prospective jurors.

In Singer v. State, 109 So.2d 7 (Fla. 1959), this court said that when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Id. at 23-23; accord, Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985).

In Hill, prospective juror Johnson said he would vote for a death sentence for defendants who had committed premeditated and felony murder. This court reversed Hill's sentence of death because a reasonable doubt existed that the prospective juror had the state of mind necessary to render and impartial sentencing recommendation. In Thomas v. State, 403 So.2d 371 (Fla. 1981), a juror, as in Hill, said that under no circumstances could he recommend a life sentence if the defendant was guilty. This court reversed, relying on the standard established in Singer.

On a constitutional level, in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in evaluating the excusal for cause of death scrupled jurors and reinterpreted the standard originally announced in

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Witherspoon required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and restated the standard:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, at 424. (footnote omitted)

This standard also applies to prospective jurors, who as in this case, favor the death penalty to the point that they would impose it regardless of whatever mitigation was presented. Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 80, 88 (1988); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). Under either standard, the trial court erred in not excusing the prospective jurors Knowles challenged for cause.

Here, there is at least a reasonable doubt that Mrs. Smith and Mr. Griffis could not impartially consider what sentence to impose.

This court in Trotter v. State, 576 So.2d 691 (Fla. 1990) held that for a defendant to preserve a claim that he was forced to improperly use his peremptory challenges he must, in addition to requesting additional peremptories, specify whom he would use those challenges on. Accord, Hitchcock v. State, 578 So.2d 685 (Fla. 1991). The reason for this unusual extra procedural step is to prevent the defendant from "sandbagging" or keeping a potentially reversible issue in hiding without the court's error making any real difference to his defense. Trotter, at p. 693. ("The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.") In this case, counsel for Knowles adequately preserved this issue for appeal.

Knowles' attorney exhausted his peremptory challenges before the jury had been selected (T 524), noting that it had been forced to excuse three prospective jurors because the court had denied his cause challenges on them (T 524). The court called ten people from the venire (T 529), and after questioning, two were excused for cause and the state excused three peremptorily (T 577, 578, 581). At that point, Knowles asked for additional peremptory challenges, and the court, before denying the request, asked him if he wanted "to put anything on the record as to why you feel that is necessary? "You don't have to unless you want to." (T 583) Counsel replied that he needed more peremptories because the court had denied his challenges for cause on three prospective jurors, forcing him to use his peremptories on them.

Why would counsel ask for additional peremptory challenges after he had exhuasted them and additional jurors had been questioned if he did not want to use them on the five members of the venire who had not been excused for one reason or another? As to that final group of ten, five were beyond his ability to excuse, and because it was a small, readily identifiable group, it is reasonable to believe that counsel did not want at least one of them on the jury. In any event, he did not "stand by silently while an objectionable juror" was seated. He let the court know that he needed more peremptory challenges to exercise on the remaining cluster of possible jurors. He had, therefore, satisfied this court's "sandbagging" concerns expressed in Trotter.

Additionally, the court arguably excused defense counsel from a strict adherence to the Trotter requirements when it told him he did not have to put anything on the record unless he wanted to do so (T 583). Thus, presuming this court intends to apply this additional step retroactively, Knowles has taken it in this case.

Here there is at least a reasonable doubt that Ms. Smith and Mr. Griffis could impartially determine Knowles' guilt, or necessarily what sentence to recommend. Ms. Smith, because she taught small children and had recently given birth, did not think she could be fair. "I would have strong opinions of it. . . . I don't think it would be fair." Likewise, she would have rejected her obligation to follow the law with regard to an insanity defense, believing that it was merely a defense

tactic to win an acquittal when the defendant really was sane. "I have read in many cases that it has not been the case, but that was what the defense has built their case on. And that's not right." (T 279-280) As this court said in Hill, supra, "A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Id. at 556. Knowles raised a defense of insanity and presented evidence to support it. His long term use of paint thinner, his alcoholism, and his low intelligence all suggest that at the time he killed Carrie Woods and his father he did not know the difference between right and wrong. Ms. Smith's views on such an insanity defense strongly indicate that the defendant would certainly have had to overcome her bias against a defense recognized by law.

In Moore v. State, 525 So.2d 870 (Fla. 1988), the defendant, like Knowles, relied on an insanity defense. During voir dire, one of the prospective jurors, a Mr. Lopez, said that he thought the insanity defense was "overused," did not believe a person should be acquitted on that basis, and would be concerned about what would happen to him following his acquittal. The trial court refused Moore's challenge for cause, forcing him to use a peremptory challenge on Mr. Lopez.

This court reversed the trial court's judgment and sentence and remanded for a new trial because the prospective juror's responses "clearly raised a reasonable doubt whether Lopez could follow the court's instructions on the insanity issue and render an unbiased verdict." Id. at 872. Accord,

Henninger v. State, 251 So.2d 862 (Fla. 1971); Noe v. State, 586 So.2d 371 (Fla. 1st DCA 1991).

In this case, Ms. Smith expressed similar views as Mr. Lopez. The insanity defense was merely a slick lawyer's ploy to return his client to the streets and thwart justice. Such beliefs indicate that she could not fairly and impartially consider that defense. In O'Connor v. State, 9 Fla. 215, 222 (1860) this court said a prospective juror should be excused even if the court had a suspicion of his or her partiality. Accord, Johnson v. Reynolds, 97 Fla. 591, 598, 121 So. 793, 796 (1926). Here Ms. Smith's statements removed any suspicion of her fairness, and the court should have excused her for cause.

Likewise, Mr. Griffis, because he had two daughters, could not fairly consider the defendant's culpability (T 259-260, 365). At best, he said that he "probably could" put aside his feelings about the case because a child was involved. His conditional answer, however, was not the type of response which the trial court could have used to justify rejecting Knowles' subsequent cause challenge. In Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987), several prospective jurors promised to try to be fair and impartial although they were unsure of their ability to be so. Such equivocal assurances of impartiality raised the reasonable doubt this court in Singer warned about in determining whether those people could fairly hear the case. Accord, Imbimbo v. State, 555 So.2d 954 (Fla. 4th DCA 1990).

If jurors cannot assure the court that they can be fair and impartial then this court cannot say that in the most fundamental sense the defendant received a fair trial as guaranteed under the constitutions of this state and nation. In this case, the trial court should have excused Ms. Smith and Mr. Griffis, not because they were bad people, but because they were honest enough to articulate what the court candidly acknowledged everyone was feeling (T 380). As the United States Supreme Court said in Witt, supra at p. 424, the prospective juror's views would "prevent or substantially impair the performance" of their duties as a juror to be fair and impartial. That the trial court did not excuse Ms. Smith and Mr. Griffis for cause thereby forcing defense counsel to use two peremptory challenges was a constitutional error, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN OVERRULING KNOWLES' OBJECTION TO THE PROSECUTOR ASKING HIM ON CROSS-EXAMINATION IF AN EARLIER WITNESS, WHO HAD TESTIFIED DIFFERENTLY THAN KNOWLES, WAS LYING.

During the presentation of the state's case, Wayne Johnson testified that Knowles had told him weeks before the killings that Knowles in essence said that at some unspecified time in the future he was going to kill his father (T 764). As part of his case, Knowles took the stand. On cross-examination, the prosecutor asked him the following:

> Q. Do you remember what Mr. Johnson testified to yesterday?
>
> A. No, I do not.
>
> Q. You don't remember the testimony that occurred yesterday?
>
> A. That is the first time I have seen that man. Daddy is the one that always bought the gas. I have never seen that man deliver gas.
>
> Q. That wasn't ;my question. My question was: do you remember him coming in her and talking yesterday?
>
> A. Yes.
>
> Q. and you remember him saying that you told him you were going to kill your father?
>
> A. Heard what he said, yes, sir.
>
> Q. And you don't remember saying that?
>
> A. No.
>
> Q. Or you believe he is lying?
>
> A. I think he is lying.
>
> Q. You believe he is lying?

A. Yes

Q. Why do you believe he's lying, Mr. Knowles?

A. Because I-

MR. COFER: Objection, Your Honor.

The court overruled the objection, and Knowles said he did not know why Johnson would lie (T 953-54).

The state then repeated the same line of questioning regarding what Earl Fagan had said when he had testified for the state. During the state's case, he had said that Knowles had told him two months before the homicides that he might someday "lose it" and start shooting people (T 780). As part of his cross-examination of Knowles the prosecutor asked:

Q. Do you remember telling the jury that you said that you were going to kill a lot of people in the trailer park?

A. I remember him saying that, yes, sir.

Q. Do you remember your telling that to Shane?

A. No, sir.

Q. Is he lying also?

MR. COFER: I would object to that--

A. Yes, sir, I think so.

THE COURT: Just a moment. The objection is overruled.

(T 954).

The court erred in overruling both objections, and such error unfairly contributed to Knowles' convictions.

The law in this area and its rationale was nicely articulated by the Fourth District Court of Appeals' opinion in Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984):

> Up to this point, the cross-examination [of a key defense witness] was perfectly legitimate. Then, over defense objection, the prosecutor asked the witness whether each of the earlier witness had been lying. This effort to isolate and thereby discredit the witness is improper for a number of reasons. It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. Barnes v. State, 93 So.2d 863 (Fla. 1957). Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness. Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980). Moreover, the fact that two witnesses disagree does not necessarily establish that one is lying. Lying is the making of a false statement with intent to deceive. Absent some evidence showing that that witness is privy to the thought processes of the other, the first witness is not competent to pass on the other's state of mind.

Id. at p. 668. Accord. Duarte v. State, 598 So.2d 270 (Fla. 3rd DCA 1992).

The error is patent in this case and unfair. It was unfair because Knowles said he did not remember making the threats, and he and the experts agreed that he had memory blackouts (T 937, 1092, 1232). Knowles, in short, could honestly have believed he did not threaten his father's life and that of the residents of the trailer park because he did not remember making them. Thus, as the court in Boatwright recognized, neither the defendant or the state's witness lied.

The defendant primarily relied on a defense of voluntary intoxication and secondarily on insanity arising from his drug and alcohol addiction. He claimed that he did not remember shooting either the girl or his father (T 949), which would have supported his intoxication defense. There was evidence, however, that his memory was not as faulty as he believed. For example, he made a cryptic comment to a convenience store clerk about 5 hours after the shootings indicating some awareness of what he had done (T 846). Additionally, he admitted to Glenn Roberson that he may have shot his father although he was unsure (T 868). Thus, asking Knowles to comment on whether earlier witnesses had lied only unfairly emphasized the problems with his claim of an empty mind. The questions assumed someone was lying then compounded that error by asking the defendant to explain why the state's witnesses fabricated their testimony. The error was not harmless beyond a reasonable doubt because the questions attacked the very essence of Knowles' defense: that he was so drunk and strung out from huffing toulene that he did not recall killing two people. The innuendo underlying the questions was that the state's witnesses had not lied and the defendant conveniently "lost" his memory to provide a defense. While this thinly veiled argument was valid for the prosecutor to make to the jury, it was error and harmful error at that for the court to ask the defendant to help him make it. McKinney v. State, 579 So.2d 393 (Fla. 3rd DCA 1991).

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

ISSUE III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF EARL FAGAN AND WAYNE JOHNSON REGARDING STATEMENTS RANDY KNOWLES MADE SEVERAL WEEKS BEFORE THE HOMICIDES FOR WHICH HE WAS CHARGED.

By way of Motions in Limine and again at trial, Knowles asked the court to exclude the testimony of Earl Fagan and Wayne Johnson regarding what the defendant had told them several weeks before he killed his father and Carrie Woods. In particular, several months before the homicides, Knowles went to Fagan's trailer drinking beer and told him that the day might come that "he just might lose it, whatever, and just go in the trailer park and shoot people." (T 774, 779-80) About six weeks before he shot his father, Knowles was again "high on something" (T 766), and he told Johnson "That old man's going to--got a surprise coming one day." He don't think I am going to do it, but I am going to blow his sh--hisself--"away." "Blow his shit away." (T 764) The court denied the motions to exclude this testimony, and it overruled Knowles' objections at trial and admitted what Johnson and Fagan heard Knowles tell them (T 120-129, 763, 779). That was error.

Section 90.803(3)(a)2 Fla. Stat. (1990) controls this issue:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even the declarant is available as a witness:
> (3)Then existing mental, emotional, or physical condition.
> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent,

> plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to: 2. Prove or explain acts of subsequent conduct of the declarant.

This court's opinion in Jones v. State, 440 So.2d 570 (Fla. 1983) illustrates how that exception to the general prohibition against the admission of hearsay works. In that case, the defendant was arrested for a traffic infraction about seven days before he murdered a police officer. At the time he was taken into custody, he said "he was tired of the police hassling him, he had guns, too and intended to kill a pig." The trial court admitted that statement, and "After detailed study of the record" this court agreed with the lower court. "Appellant's statement of his intention to kill a police officer contains sufficient probative value to draw the inference that the act was done." Id. at 577.

If 90.803(3)(a)2 is given its literal impact then we would all have to worry because statements made years ago would come back to haunt us. Instead, there should be some reasonable limit to admitting prior statements of future intent. In Jones this court had to do a "detailed study of the record" before it affirmed the lower court's ruling. Evidently the amount of time between the statement and the act troubled this court.

If a seven day gap bothered this court in that case, six week and two month periods between what Knowles said and did should be more disconcerting. This should be especially true because when the defendant made both statements he was drinking beer, and was probably drunk or "high." (T 766, 779) Thus,

while what Knowles said was relevant to the state's case against him, its prejudicial value, considering the very lengthy time between what he said and did as well as his condition when he made the statements, outweighed whatever logical relevance they had. This court should reverse the trial court's judgment and sentence and remand for a new trial.[3] All the statements did was exhibit his bad character.

---

[3]Several empty gallon cans of toulene were found in the woods behind the trailer Knowles lived in (T 1209). A hundred empty Goody Powder wrappers were found near the trailer (T 1210).

ISSUE IV

THE COURT ERRED IN REPEATEDLY DENYING KNOWLES' MOTIONS FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRODUCED INSUFFICIENT EVIDENCE THAT HE PREMEDITATEDLY MURDERED CARRIE WOODS AND HIS FATHER.

The state charged Knowles with two counts of first degree murder, and although it would not concede it was relying solely on a theory of premeditation, in fact that was the only basis on which it could have proceeded in the killing of Carrie Woods. The state claimed robbery could have been used in the murder of Knowles' father, but as argued in Issue VII, there was insufficient evidence that the defendant killed his father so he could steal the truck. Hence, even for the father's killing, premeditation was the theory on which the state prosecuted Knowles. It is understandable why it wanted to use a felony murder theory because the evidence that Knowles had a premeditated intent to kill his father was very weak and as to Carrie Woods it was non-existent. In both homicides the state presented insufficient proof that the defendant premeditated the murders.

As this court has said, "Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act." Asay v. State, 580 So.2d 610, 612 (Fla. 1991). Typically, the defendant does not announce his intent to kill, so premeditation is usually proven by the circumstances in which the homicide was committed. As such,

the evidence relied on to establish the requisite intent must be inconsistent with any other reasonable hypothesis of innocence. Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986). In Larry v. State, 104 So.2d 352, 354 (Fla. 1958), this court articulated five factors which can help in analyzing whether a defendant had the requisite premeditation to be found guilty of first degree murder:

> Evidence from which premeditation may be inferred includes such matters as [1] the nature of the weapon used, [2] the presence or absence of adequate provocation, [3] previous difficulties between the parties, [4] the manner in which the homicide was committed, and [5] the nature and manner of the wounds inflicted.

To this list might be added the presence or absence of any drug or alcohol use by the defendant. Applying these factors to this case and then comparing this case with others in which the issue of whether the defendant had the requisite intent will show that here Knowles committed only two second degree murders.

1. The nature of the weapon used.

Knowles used a .22 caliber semiautomatic rifle to kill Woods and his father (T 815, 945, 971). While it was a lethal weapon, neither it or the bullets were particularly so, Griffin v. State, 474 So.2d 777, 780 (Fla. 1985). Also, that the rifle was a semiautomatic meant that Knowles need only pulled the trigger to fire it. In Songer v. State, 322 So.2d 481 (Fla. 1975), this court found the defendant had premeditatedly killed a policeman in part from the evidence that the defendant had to

"fan" the pistol for rapid fire. Here, Knowles need only repeatedly pull the trigger to get the rifle to shoot. No additional motion than the twitch of the finger was necessary.

Pulling a trigger requires so little effort or thought that premeditation is significantly more difficult to prove when that is the only evidence offered to establish that element of first degree murder. When someone uses an axe to repeatedly bludgeon his or her victim, see, Larry, supra, or a knife to repeatedly stab a person, Penn v. State, 574 So.2d 1079 (Fla. 1991), premeditation becomes easier to prove since so much more effort, determination and time is required to kill the victim. Not so in cases such as this where the killing can occur almost before the defendant realizes what has happened.

2. The presence or absence of adequate provocation.

This is a curious factor because if there had been adequate provocation, the defendant would not be guilty of premeditated murder. What is probably meant is the cold blooded, unnecessary killing of the victim. Typically, this factor focuses on the events immediately surrounding the homicide that might have warranted the homicide. For example, in Griffin, supra, the defendant killed a convenience store clerk during the course of a robbery. The co-defendant heard nothing unusual before the shooting. To the contrary, "the victim in fact cooperated with the robbery, taking off and giving to Stokes [the co-defendant] a gold neck chain Stokes had been unable to pull off." Id. at 780. Had the victim refused to give up the chain, such refusal might have provoked

the shooting, but he offered no resistance, so the murder appeared to have been done for no reason other than to kill.[4]

In this case, as to Carrie Woods, there was nothing she did to provoke Knowles shooting her. The two had never met, and until seconds before the defendant appeared at the trailer door, he had never seen the youth (T 940). Obviously she did nothing to provoke him because he had demanded nothing of her as the defendant in Griffin had done. Moreover, what he told Glen Roberson the day after the homicides indicates he did not even know he had shot her. "He told me he kicked in a trailer door and shot a bunch of mother fuckers." (T 868)

The rest of that statement, that "He shot one guy, . . . right here in this truck. And I think one of them might have been daddy." (T 868) also indicates he had no idea what he had done the night before. Immediately before Knowles shot his father, he was seen talking with him, and he was heard telling him "No you won't." (T 702) What that refers to is unknown. As with Carrie Woods, the elder Knowles had very little contact with his son immediately before his death, and from what the evidence showed, he did little to provoke the shooting. On the other hand, there is no evidence that his son wanted any thing from him that would cause him to shoot.

3. Previous difficulties.

---

[4]This court rejected the trial court's finding that the murder had been committed to avoid lawful arrest. Id. at 781.

This factor is similar to the previous one but emphasizes the longer term problems that might have existed between the defendant and the victim. In Woods' case, there was, of course, no history of problems between the defendant and the girl. This case is similar to Purkhiser v. State, 210 So.2d 448 (Fla. 1968) in which the victim was a 12 year old girl who was shot during a "sudden and brief encounter between her father and the defendant, who came to the door in search of another man with whom he had quarreled earlier in the day." The girl and Purkhiser, as were Woods and Knowles, were strangers to each other. This court in Purkhiser's case found that the defendant had not killed the girl with premeditation.

In Wilson v. State, 493 So.2d 1019 (Fla. 1986) Wilson and his father were engaged in a violent fight which raged through their house. During this struggle, the defendant stabbed his 5 year old nephew with a pair of scissors that the two Wilsons were struggling over. The boy apparently happened to be in the house while the two men were fighting. This court said the homicide of the child was accidental primarily because Wilson told the police it was so, and the state presented no evidence to refute that assertion. Id. at 1023.

Similarly here from what the evidence shows, Woods had the tragic misfortune to be at the wrong place while Knowles was drunk, high, and probably hallucinating. There is no evidence the two had ever had problems before or that Knowles killed her because he had some lingering hatred towards children. See, Asay, supra, pp. 612-13.

The same thing can be said of the defendant and his father. Of course, Knowles and his father had a long term relationship, and as is often true, they probably got on each others nerves from time to time. That is evident from what Knowles said about six weeks before he killed his father. "That old man's going to --got a surprise coming one day. . . He don't think I am going to do it, but I am going to blow his sh--hisself away. Blow his shit away." (T 764) A claim to do something in the undefined future, especially when the person making the threat is drunk, high, glassy eyed, whose speech was "kind of rambling," and whose "body was there, but his mind may have been someplace else (T 766-67), does not provide adequate proof of his intent to do an act six weeks later. Although his father had done nothing to provoke Knowles, that fact provides no assistance in determining whether he had a premeditated intent to kill the person the court admitted he loved (T 2413). From what he told Roberson the day after the killing, he did not know who he had shot but was afraid he may have killed his father (T 868). That was consistent with what he told the police that "some things he could remember. And some things he could not remember. . . . He remembered shooting but he didn't remember shooting anyone." (T 908-10)

4. The manner in which the homicide was committed.

Both killings were by gun and quickly committed. Carrie was shot three times in the arm, and only by tragic fortuity did one of the bullets hit her lungs and pierce her aorta

(T 814). The other two bullets posed no threat to the girl's life (T 823-26). Likewise, although the elder Knowles was shot twice, one of the wounds was a "glancing" type wound and not fatal (T 834).

These homicides are in stark contrast to the ax murder in Larry, and the multiple stabbing death in Penn v. State, 574 So.2d 1079 (Fla. 1991). They also contrast well with the multiple shooting death in Songer, supra. In that case, the defendant claimed he had shot a policeman while in a drug stupor. The facts, however, belied that claim because Songer, who asserted he was lying on the floor of a car at the time of the shooting, had to "fan" the pistol rapidly. Each of the four shots fired hit the officer, exhibiting an accuracy not expected of one who claimed he was drugged.

In this case, the use of a .22 caliber semiautomatic rifle, the quick shootings, the lack of any evidence Knowles aimed the weapon, and that several of the bullets would have caused no permanent damage indicate a lack of premeditation.

5. The nature and manner of the wounds inflicted.

Both victims were shot by a small caliber rifle, and as such the wounds were not extensive. In Larry, supra, the victim was "beat to a pulp like crushed ice and his head was half severed. In Wilson, supra, Wilson Sr. "was found in a seated position on the floor with his head in a chair. He had been shot in the forehead with the bullet entering in a `backward,' `downward' direction." Id. at 1022. He also had been brutally beaten with a hammer. The nature of these wounds

refuted the defendant's claim of accident or that the murder occurred during an extreme rage.

In this case, Woods' wounds suggest that Knowles never aimed the rifle and merely fired it in reaction to some drug and alcohol induced hallucination. Unlike the elder Wilson in Wilson, had the child moved a fraction of inch in almost any direction she probably would not have died. There simply was no deliberate shooting of Woods since each of the shots fired initially entered the child's arm.

The wound to Knowles' father also indicates a spontaneous shooting. That is, the fatal shot to the head was "upwards" (T 831) indicating that the defendant was holding the weapon by his side and at arm's length when fired because his father was sitting in a truck when shot (T 687). No one saw the defendant aim the gun, and if he had, the entrance wound would probably had been downward since he would have had to bring the weapon to his shoulder to aim it.

6. Knowles' intoxication.

The Larry factors do not directly focus on evidence of the defendant's intoxication, and in the discussion above, Knowles' drunkenness was mentioned only in support of the argument on one or more of the factors this court identified. Songer tacitly admitted that it was a factor, and the law generally allows the defendant's voluntary intoxication to mitigate what otherwise would be a first degree murder since it impairs the defendant's intent to kill Gardner v. State, 480 So.2d 91, 92 (Fla. 1985). In this case, the uncontroverted evidence

established that not only was Knowles drunk when he killed Woods and his father, he was in the worst shape those who knew him had ever seen him. Alice Pitts, the mother of Earl Wingate, a drinking buddy, said that when she saw him at 5 p.m., "He just looked like he wasn't there. He was just gone." She had never seen him in that condition before. It was the worst she had ever seen him (T 1068). Wingate said he was "very drunk. And he had been huffing." (T 1058) The clerk of the store Knowles got gas and a 12 pack of beer from about 5 hours after the killings thought the defendant was "nuts" and drunk (T 850-51). Even a day later when Glen Roberson saw him, "He looked rough. He was shaky. He was haggered." (T 867-68)

This is a very difficult case to deal with emotionally. A young child was senselessly killed at a friend's birthday party. At least one juror openly wept when the medical examiner testified (T 817). Before he testified, Earl Wingate was threatened by one of the victim's family members (T 1015-18). Despite the revulsion we feel towards these crimes and the defendant, he did not commit a first degree murder of either his father or Carrie Woods. This court should reverse the trial court's judgment and sentence and order that his conviction be reduced to second degree murder and he be sentenced accordingly.

ISSUE V

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

In sentencing Knowles to death, the court found that he had killed his father to avoid or prevent his arrest for the robbery of the elder Knowles (R 2417). As evidence supporting this aggravating factor, the court said:

> FACT: Randall Scott Knowles murdered his Father, Alfred Knowles, to steal his Father's truck in order to flee a lawful arrest after murdering Carrie Woods.
>
> CONCLUSION: There is an aggravating circumstance under this paragraph since Alfred Knowles was murdered in order for defendant to steal Alfred Knowles truck, hoping thereby, to avoid lawful arrest.

(R 2417).

While these facts may suggest that Knowles killed his father to avoid his arrest for the murder of Carrie Woods, they do not show that they were the dominant motive as required by law. Menendez v. State, 368 So.2d 1278 (Fla. 1979). In enacting Section 921.141 Fla. Stat. (2989), the legislature intended that the factor allowing murders committed to avoid lawful arrest to aggravate a capital felony to a death sentence apply primarily to killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). This death sentence justification need not apply exclusively to this class of victims; and if a court wants to apply it to other persons, then the dominant motive for the killing must be to avoid arrest. The proof of this intent must be very strong, and the

mere fact that someone is dead does not support finding this aggravating factor. Riley v. State, 366 So.2d 19 (Fla. 1979). An absence of another rationale likewise cannot be the evidence of the defendant's intent: the state, by positive proof must show that the defendant's primary reason for committing the killing was to eliminate a witness. Some cases will illustrate how difficult a burden this is for the state to carry.

In Livingston v. State, 565 So.2d 1288 (Fla. 1990), the defendant robbed a clerk at a convenience store and after killing her, he said that he was going to get the other clerk who had hidden in the back of the store. He fired a shot through the door of the closet in which she was hiding but did not kill her. The murder was not committed to avoid lawful arrest. Likewise, in Menendez v. State, 368 So.2d 1278 (Fla. 1979), the victim was found lying on the floor of his jewelry store with his hands outstretched in a supplicating manner. Menendez had killed the victim with a gun which had a silencer on it. While these facts certainly suggest that the defendant committed the murder to avoid lawful arrest, they also did not amount to the "very strong evidence" this court has required.

On the other hand, in Lopez v. State, 536 So.2d 226 (Fla. 1988), the defendant and an accomplice entered a house, and once outside they shot (but did not kill) one victim and murdered her son. Lopez used a silenced gun to do so, and what made this case different than Menendez was his unambiguous statement that he could not afford to leave any witnesses.

This court found that he committed the murder to avoid lawful arrest.

Garron v. State, 528 So.2d 353 (Fla. 1988), while not factually similar to this case, puts it in perspective. In that case, Garron murdered his wife with a gun. As one of daughters called the police for help, the defendant killed her. Although the trial court said her murder was done to avoid lawful arrest, this court disagreed: "Here, there is no proof as to the true motive for the shooting of Tina [the daughter]. Indeed, the motive appears unclear. The fact that Tina was on the telephone at the time of the shooting hardly infers any motive on the appellant's part." Id. at 360.

If the evidence in Garron was unclear regarding the defendant's motive for shooting his daughter then the same must be said about the reason Knowles killed his father. There is no evidence that the elder Knowles knew of the murder of Carrie Woods and was going to report it to the police. True, Knowles said "No you won't." (T 702) immediately before he shot the elder Knowles, but we do not know in what context he made that statement, and it merely reflects the underlying ambiguity of this entire incident. Afterall, as the court found in mitigation, Knowles loved his father (T 2413), so it is hard to believe that he would kill his 77 year old father simply to steal his truck. If theft was on his mind, the 38 year old defendant could simply have pulled his aged parent out of the truck and driven away.

Like the motive in Garron, Knowles' reason for shooting his father remains unclear, and this court certainly cannot say that the dominant reason he committed that murder was to avoid lawful arrest.

Compounding the court's error in finding this aggravating factor was the instruction to the jury that it could also consider it in deciding whether to recommend Knowles live or die. The evidence was simply insufficient to warrant giving it. Moreover, the error was prejudicial to Knowles because the court found only two other aggravating factors, and there was an abundance of strong mitigation. This court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing before a jury.

ISSUE VI

THE COURT ERRED IN FINDING THAT KNOWLES COMMITTED THE MURDER OF HIS FATHER DURING THE COURSE OF A ROBBERY.

In justifying sentencing Knowles to death, the court found in aggravation that he had killed his father and stolen his truck.

FACT:
Randall Scott Knowles murdered Alfred Knowles and then stole Alfred Knowles' truck.

CONCLUSION:
There is an aggravating circumstance under this paragraph because Randall Scott Knowles murdered Alfred Knowles while attempting to steal Alfred Knowles' truck.

The court erred because there is no evidence Knowles was trying to steal his father's truck. Specifically, the state failed to prove the defendant was taking the property of another.

Although the state can establish this aggravating factor without charging Knowles with robbery, Ruffin v. State, 397 So.2d 277 (Fla. 1981), it must prove beyond a reasonable doubt that he committed this crime. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Robbery in turn is the forceful taking of the property of another. See, Standard Jury Instructions (Crim.). It differs from theft by the added element of force or fear used in the taking.

For purposes of this argument, the taking must be of the property of another. One cannot steal someone's property or rob him of it if the defendant also has a possessory interest

in it. See, Hinkle v. State, 355 So.2d 465 (Fla. 3rd DCA 1978). This is not to say he has committed no crime because if force was used to carry out the taking, the defendant may be guilty of aggravated assault, or as in this case, murder. Nevertheless, he is not guilty of robbery because the defendant cannot steal that which he owns.

In this case, the state never proved what the court asserted as a fact: that Knowles stole his father's truck. There was no evidence that Knowles senior had an exclusive interest in that truck, or that it was even superior to that of his son. In fact, the defendant frequently drove the truck, having, as one witness said, free use of the vehicle (T 1030). At worst, therefore, he had a reasonable expectation of the use of the truck, so that he could not have stolen that which his father had let him use.[5]

Thus, the court erred in presuming Knowles' stole his father's truck because that "fact" formed the basis for justifying that the defendant had killed his father during the course of a robbery. This court should reverse the trial court's sentence and remand for a new sentencing hearing before a new jury. It should do the latter because the jury was instructed on this aggravating factor, and that was error because the evidence was insufficient to support giving this

---

[5]If the truck was the father's and he had let his son use it, there was no evidence he had withdrawn his permission for him to drive it.

instruction.

ISSUE VII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND KNOWLES GUILTY OF THE MURDER OF HIS FATHER UNDER A FELONY MURDER THEORY.

If this court accepts the argument presented in the previous issue, that there was insufficient evidence Knowles robbed his father of the truck, then it must agree that the court erred in telling the jury, at the conclusion of the guilt phase of the trial, that it could find him guilty of murdering his father under a felony murder theory (T 2264-66). The court instructed the jury on this theory of prosecution over defense objection (T 1681), and it refused a defense request for a jury verdict form indicating whether they found Knowles guilty of premeditated first degree murder and/or felony murder (T 2016, 1553).

In Washington v. State, 432 So.2d 44 (Fla. 1983), the defendant made a similar claim as that made here: that there was insufficient evidence of the alleged felony to warrant a felony murder instruction. This court rejected that argument because the state's sole argument was based on premeditation, it made no mention of a felony murder theory in closing argument, the evidence overwhelmingly showed the murder was premeditated, and the court merely mentioned felony murder when it read the standard jury instruction to the jury. Such is not the case here.

The state specifically asked the court for a special instruction on felony murder (T 1550-54), which after extensive discussion the court refused to give, preferring to use the

standard instruction on felony murder. Additionally, unlike Washington, the court here emphasized the felony murder instruction by also defining robbery as the underlying offense justifying the felony murder instruction (T 1681-82). The state did not say much about the felony murder theory in its closing argument, focussing instead on Knowles' claim of insanity. The defendant, however, discussed it at some length (T 1632-33) during its argument to the jury. Finally, though the state's evidence showed Knowles committed premeditated murders, unlike Washington, the state primarily focussed its closing argument on his insanity and intoxication defenses. Unlike the evidence in Washington, what the state presented here did not overwhelmingly point to premeditation to the utter exclusion that the crimes were committed by one so crazy or drunk he did not know what he was doing. This case, in short, is so far distinguishable from Washington that it differs from this case on every critical factor this court identified in the former case. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VIII

THE COURT ERRED IN USING THE MURDER OF ALFRED KNOWLES TO AGGRAVATE THE KILLING OF CARRIE WOODS AND THE MURDER OF CARRIE WOODS TO AGGRAVATE THE KILLING OF ALFRED KNOWLES.

This issue requires this court to determine the narrow question of whether two murders, arising from the same criminal episode, can be used to justify a death sentence for the other. In this case, the court found as an aggravating factor in the murder of Carrie Woods that Randy Knowles had a "prior" conviction for the first degree murder of his father, Alfred Knowles. It also found as an aggravating factor in the murder of Alfred Knowles that the defendant had a "prior" conviction for the first degree murder of Carrie Woods. Applying the aggravating factor, that "the defendant was previously convicted of another capital felony" Section 921.141(5)(b) Fla. Stat. (1990) to both murders was error.

This court has succinctly articulated the law regarding using contemporaneous convictions of violent crimes to aggravate a capital murder:

> We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes.

Pardo v. State, 563 So.2d 77, 80 (Fla. 1990).

Typically, the other violent crimes arose from scenarios involving the attempted murder of a deputy chasing the defendant who had fled the scene of a robbery-murder, Johnson

v. State, 438 So.2d 774 (Fla. 1983); the attempted murders of two victims occurring during the same episode as the murder of another victim, King v. State, 390 So.2d 315 (Fla. 1980); or the murder and robbery of one victim during the same time as another victim was killed. LeCroy v. State, 533 So.2d 750 (Fla. 1988). No case has been found involving multiple murders arising from the same incident where the court has used individual killings to aggravate the other murders and then used those other murders to aggravate the first murders. In other words, the court in this case created a novel situation when it aggravated Alfred Knowles' murder with that of Carrie Woods' murder, and did the same with Carrie Woods' murder with Alfred Knowles' killing.

Such would have been acceptable if the two murders involved different victims or separate episodes. A strict, narrow, and pinched reading of what this court said in Pardo would summarily reject this issue since two victims were obviously involved. Just as obviously, however, there cannot be multiple murders without multiple victims. One cannot murder a person more than once. The multiple victims situation, therefore, should not apply in situations like this where the court uses that fact to aggravate each murder.

Similarly, these murders did not arise out of separate episodes. Knowles killed Carrie Woods first and then minutes later he killed his father a short distance away with the same gun as that used to kill Woods. The two murders were charged in the same indictment and Knowles would have properly lost a

motion to sever had he filed one. Livingston v. State, 565 So.2d 1288 (Fla. 1988). Thus, the two murders arose out of the same episode.

This does not mean that the court could not have used one of the murders to aggravate the other. LeCroy, supra. Knowles only argues that it could not use one to justify a death sentence on the other and vice versa. The question thus raised is which murder does this aggravating circumstance apply to? The problem is more than academic because the trial court found only this factor to justify sentencing Knowles to death for the murder of Carrie Woods. Thus, if the prior conviction for the murder of Alfred Knowles does not apply, the defendant's death sentence for Woods cannot stand.

The issue also becomes more complicated because the court instructed the jury that it could use the murders of Woods and Knowles to aggravate the murders of the other (T 2374). To resolve these problems, Knowles asks this court reverse to the trial court's sentence of death and remand for a new sentencing hearing before a jury. That court can then decide which murder this aggravating factor applies to or it can instruct the jury that it can apply it to only one of the crimes and leave the matter to that body to determine which murder can aggravate the other.

ISSUE IX

THE COURT ERRED IN OVERRULING SEVERAL DEFENSE OBJECTIONS TO THE STATE'S CLOSING ARGUMENT DURING THE PENALTY PHASE OF THE TRIAL.

As part of its closing argument during the penalty phase of Knowles' trial, the state, over defense objection, told the jury 1) that Knowles' use of alcohol and toulene caused his mother to become mentally ill, and 2) the defendant repeatedly showed a lack of remorse for the murders he committed (T 1816). These arguments must have had a powerful affect on the jury's recommendation, yet the court should not have allowed it.

The law in this area is simple, and its application straight forward. The purpose of closing argument is to assist the jury in analyzing and applying the evidence presented at trial. United States v. Door, 636 F.2d 117, 120 (5th Cir. 1981). Either side can argue from what was presented at trial and reasonable inferences arising from that evidence. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). Wide latitude is recognized in making arguments, but a new trial, or as in this case, a new sentencing hearing, should be granted when "it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2d 287, 289 (Fla. 1977). Neither side, of course, can present arguments based on facts not in evidence or law not applicable to the case.

As part of its closing the state asked the jury:

> Were his acts those of somebody who realized when he had done, that he had done something wrong, and therefore, he wanted to turn himself in? No, sir. He want to find out if he was wanted.
>
> Were they consistent with remorse or consistent with waking up the next... and just think about this for a minute. I don't know what time he woke with the woman, but obviously it was still dark, so probably some time before 6:30 in the morning.
>
> * * *
>
> And what are his actions of committing the murders at the time that he probably remembers them most clearly? The desire to have sexual intercourse, which is a very normal reaction, not consistent with remorse for killing a child and his father, and very respectfully, not consistent with substantial impairment or extreme emotional disturbance, but consistent with logical clear thinking, like the clear thinking described by the witnesses here today.

(T 1835-36).

In Pope v. State, 441 So.2d 1073 (Fla. 1983), this court held that "from henceforth lack of remorse should have no place in the consideration of aggravating factors." Id. at 1078. In that case, the sentencing court justified its finding that the murder Pope had committed was especially heinous, atrocious, or cruel, in part because he had not shown any remorse. Significantly, that comment was not the only time the issue of remorse had arisen. In Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), Pope challenged the effectiveness of his trial lawyer's representation of him during the state's penalty phase closing argument. In particular, the prosecution had said, "There is no remorse. You haven't seen a grain [of] remorse. If there

is ever going to be a tear in Tom Pope's eye, it is going to be for himself." Id. at 802. This court said this comment (and others not quoted) were "clearly improper." Id. at 803. The import of these two cases is that any reference to the defendant's lack of remorse, either by the prosecutor or the sentencing court, is improper. Wike v. State, 596 So.2d 1020, 1025 (Fla. 1992).

Can the state, however, prevail at the last by gasping harmless error? The facts of this case present one of the most poignant tragedies appellate counsel has ever been involved in. A drunk and doped up defendant senselessly murdered a completely innocent young girl at a friend's birthday party. What should have been a happy, festive occasion suddenly became a parent's worst nightmare, the death of a child. How can any mother or father not shrink from the prospect of facing this hardest of all possibilities, that of burying a child who had brought her or him the greatest joy, the most hope for the future?

Obviously some of the jurors had this in mind because during the medical examiner's testimony, at least one of them was crying (T 817). Also, one of the victim's relatives threatened a defense witness before he testified (T 1015-18).

The emotions easily aroused by the facts of this case were only fueled by the state's portrayal of Knowles as without remorse. It created the picture of contrasts between a defendant who cared only to get drunk and nothing to kill and a

young child whose only sin was to be at a friend's house enjoying a birthday celebration.

The contrast painted by the state emerged in the trial court's sentencing order. It could not ignore the unjustness of the picture the state presented because it portrayed Knowles as a "party animal," as one who killed Carrie Woods and his father while in some drunken daze. The thrust of its "Comment of the Court" (T 2405-2407) is premised on Knowles' lack of remorse. Its portrayal of the defendant as a party animal who went from one drunken pleasure to the next oblivious or indifferent to the havoc he was reeking amounts to it asserting that he had no remorse for the murders he had committed during his twenty-four hour debauchery.

If the court, which is supposed to be less influenced and swayed by the emotions of trials such as this, State v. Dixon, 283 So.2d 1 (Fla. 1973), readily fell prey to them, then how much more so was the jury. The error in this case could not have been harmless beyond a reasonable doubt.

The state also argued that Knowles caused his mother's mental health to deteriorate during the four years a friend of the family was in the military.

> David Sullivan, a friend, said he [Knowles] has low intelligence. We know that. And when David Sullivan got back from the military the family was all split up. The mother had mental problems. Because of the defendant's abuse.
>
> MR. COFER: Objection. I object. That is not the proof of the case.

(T 1815-16).

After some discussion, the court overruled the objection, agreeing that the state's argument was an "inference that could be drawn." (T 1819) There is, however, no connection between the mother's mental illness and Knowles use of toulene and alcohol. All the evidence shows was the gradual deterioration of Knowles' mother and the defendant's increasing use of intoxicants. There is no evidence that the two happened at the same time or that his mother was even aware of her sons' problems. All we know are two facts: Knowles' mother became increasingly mentally unstable and Knowles became addicted to alcohol and toulene (T 1763-1766, 1778-1780). There is no evidence and there can be no reasonable inference drawn from this record that supports the conclusion that because of Knowles' addiction his mother lost her mind.

Yet this argument emphasized the state's "lack of remorse" theme. This "party animal" had gone through life caring only for his pleasure, destroying all those who loved him, starting with his mother and ending with his elderly father and a ten year old girl. This part of the state's closing argument was wrong, and the error in not sustaining the defendant's objection to it was not harmless.

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

ISSUE X

THE COURT ERRED IN SENTENCING KNOWLES TO DEATH BECAUSE SUCH A SENTENCE IS NOT PROPORTIONATELY WARRANTED UNDER THE FACTS OF THIS CASE.

As part of its review of death sentences, this court in recent years has shown an increasing willingness to reduce such penalties to life in prison despite a jury recommendation of death. It has done so because it has the obligation to review a death sentence to insure that in a particular case it is deserved when compared with other cases involving similar facts.

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974).

Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). Thus, this court will compare the facts of the case under consideration with other cases involving similar situations to decide if a death sentence is warranted. Proffitt v. State, 510 So.2d 896 (Fla. 1987). Accordingly, this Court has reduced several death sentences (though the jury recommended death and one or more valid aggravating factors were present) when the murder arose out of a domestic dispute or the defendant had been drinking at the time he committed the murder. Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State, 465 So.2d 496 (Fla. 1985). Knowles' case falls within the rationale of these cases, and his death

sentence should be reduced to life in prison without the opportunity of parole for 25 years.

In Ross, this Court approved the trial court's finding that Ross killed his wife in an especially heinous, atrocious, and cruel manner. This Court, however, also said that the trial court had given insufficient consideration to the conflicting evidence of Ross' drunkenness on the night of the murder. In addition, the court found that Ross' lack of a history of prior violent criminal activity and his lack of a long period of reflection were significant, and it reduced Ross' death sentence to life in prison.

In Caruthers, Caruthers robbed and killed a clerk at a convenience store. In sentencing the defendant to death (following the jury's death recommendation), the trial court found that the murder was committed:

> 1. while Caruthers was engaged in the commission of an armed robbery.
>
> 2. to avoid or prevent a lawful arrest.
>
> 3. in a cold, calculated, and premeditated manner.

In mitigation, the court found that Caruthers lacked a significant history of prior criminal activity.

On appeal, this court rejected the factors that the murder was committed to avoid lawful arrest and that it was cold, calculated and premeditated. That holding left only one aggravating factor and it was part of the criminal transaction that included the murder. In addition, this court considered that Caruthers had drunk a considerable amount of beer while on

a fishing trip on the day of the murder. Despite the jury's recommendation and the trial court's order, this court reduced Caruthers' sentence of death to life in prison.

In Rembert, Rembert entered a bait and tackle shop, hit the elderly victim once or twice on the head, and stole $40 or 60 dollars from her. Rembert also had been drinking for part of the day. The jury recommended death, and the trial court sentenced Rembert to death. The court found in aggravation, that the murder was 1) a felony murder, 2) committed to avoid or prevent arrest, 3) heinous, atrocious and cruel, and 4) cold, calculated, and premeditated. It found nothing in mitigation.

On appeal, this court rejected three of those aggravating factors and affirmed only that the murder had been committed during a felony. It then reduced Rembert's death sentence to life in prison because nothing distinguished this murder from the norm of capital felonies.

Two facts link these cases. First, each defendant had been drinking before he committed his murder. (In Ross, though the evidence was conflicting on this point, this court said that Ross had been drinking heavily immediately before the homicide). Second, only one or two aggravating factors were present, and those tended to be inherent in the type of murder committed. For example, in Caruthers the only factor applicable was that Caruthers committed the murder while he committed an armed robbery. In Rembert, a similar situation existed. In all cases, this court gave more weight to the

mitigating evidence than the trial court had done, and in comparison to other capital murders, these men did not merit execution.

The use or rather the non-use of alcohol has been absent in other cases which this case has reduced a death sentence. For example, in Wilson v. State, 493 So.2d 1019 (Fla. 1986), this court reduced the defendant's death sentence under a proportionality review because even though the murder was premeditated, such prior planning was of short duration. In Blakely v. State, 561 So.2d 560 (Fla. 1990) this court reduced the defendant's death sentence because he was a non-violent person whose strong willed wife made his home a hell on earth.

A similar result should be reached here. Knowles has attacked all of the aggravation found by the court. Moreover, he presented compelling evidence that his life, at least since he was 14, was one of heavy drug use, including, incredibly, "huffing" paint thinner. Compounding this addiction was his heavy dependency on alcohol, particularly beer. A drinking buddy testified, for example that Knowles drank a twelve pack or case of beer each day (T 1012). Not surprisingly, he had a low intelligence, and there was evidence that he was brain damaged (T 1108, 1110, 1244, 1329, 1452, 1599), again not a very surprising fact considering that he had been "huffing" toulene for almost 25 years and was taking headache powders by the gross to kill the pain in his head (T 934).

These murders, therefore, clearly make no sense, and while the jury may have believed he premeditated them, like the

defendant in Wilson, Knowles certainly did not have the mind to have thought much about killing either Carrie Woods (whom he did not know) or his father (whom he loved). Unlike Dougan in Dougan v. State, 595 So.2d 1 (Fla. 1992), this court cannot say the defendant here "knew precisely what he was doing." To the contrary, because he frequently hallucinated while under the influence of the Toulene (T 1090, 1242), he may have very well have been so deluded when he committed these two murders.

Under a proportionality review, this court should reduce the death sentences in this case to life in prison without the possibility of parole for 25 years.

ISSUE XI

THE COURT ERRED IN INSTRUCTING THE PENALTY PHASE JURY ON THE WEIGHT THEIR RECOMMENDATION WOULD HAVE IN DETERMINING THE APPROPRIATE SENTENCE THE COURT WOULD IMPOSE ON KNOWLES, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION.

Trial counsel requested the court instruct the jury that would consider what sentence to recommend the court impose on several matters that were not contained in the standard jury instructions (T 1708-20). Conveniently, he submitted to the court a copy of the standard instructions with the additions he proposed (T2341-49).[6] Specifically, he asked the court to tell the jury before they heard any evidence on the penalty issue that "the law requires the court to give great weight to your recommendation. I may reject your recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ." (T 2341-42) He also wanted the same guidance be given them after they had heard the evidence (T 2343), and in a modified form at the end of the instruction, he wanted the court to tell them that they were to presume that whatever sentence they recommended would be what the court imposed (T 2348). The court declined to adopt any of counsel's proposed additions and gave, instead, the standard instructions (T 1722). That was error because the court never adequately

[6]He also attached a memorandum of law for each requested instruction (T 2349-64).

stressed the significance their recommendation would have with the trial court.

A. Caldwell v. Mississippi.

The United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) gets this issue going. In that case, a Mississippi prosecutor led the sentencing jury to "believe that responsibility for determining the appropriateness of the defendant's death [rested] elsewhere." Id. at 329. In Mississippi, as this court would point out in distinguishing Caldwell, the jury actually sentenced the defendant to death, whereas in Florida it merely rendered an advisory recommendation with the trial court actually imposing the sentence. Combs v. State, 525 So.2d 853 (Fla. 1988) ("[T]he court is the final decision-maker and the sentence-not the jury.")

The Supreme Court disapproved of what the prosecutor had done for two reasons: 1) Death penalty sentencing require a significantly greater degree of scrutiny than non-capital sentencing. 2) The capital sentencing process should facilitate the "responsible and reliable exercise of sentencing discretion." Caldwell, at 329. The sentencing schemes, in short, must insure that the sentencer takes his task seriously. Where it does not do so, any number of extraneous factors may influence the decision to sentence the defendant to death. In particular, the jury may "send a message" to the defendant of the jury's complete revulsion of the defendant and what he has

done. Id. at 331-32. Additionally, given the stress inherent in passing judgment on whether a fellow human being should live or die, a prosecutor or judge might want to relieve this pressure by telling them that others will have the ultimate duty to determine if death is appropriate. Id. at 333. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986).

As just mentioned, this court responded to the Caldwell situation by noting the differences in the Mississippi and Florida sentencing schemes. The court and not the jury was the sentencer, and this court found nothing wrong with telling the jury about the limits of its sentencing responsibility, "as long as the significance of its recommendation is adequately stressed." Pope, at 805. Nevertheless, even when it was most adamant about the distinction, this court added the limitation announced in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), that the jury's recommendation is entitled to great weight and can be disregarded only if virtually no reasonable person would agree that the jury's recommendation was correct. Combs, supra, at 857. It could, therefore, be argued that Florida's sentencing scheme differs from Mississippi's in only those relatively few cases where the jury goes wild and makes a totally irrational recommendation. As the United States Supreme Court recently said of Florida's sentencing scheme, "the trial judge does not render wholly independent judgment, but must accord deference to the jury's recommendation." Sochor v. Florida, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d 326, 337 (1992).

The Eleventh Circuit Court of Appeals meanwhile had ruled in a Florida case that Caldwell had been violated. Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). This court criticized the Mann decision, claiming that it had taken part of the instructions out of context and ignored other parts. Combs at 857-58.

An en banc court, however, reaffirmed the panel's decision. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). It specifically said the prosecutor's comments had misled or confused the jury as to its sentencing responsibility. The trial court also did nothing to correct the false impression left by the prosecutor. Even the concluding instruction[7], which this court in Combs at 457 said the 11th circuit panel had ignored, the en banc court held that was inadequate Id. at 1458. "Because the overall effect of the court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, petitioner's sentence is invalid under the eighth amendment." Id. at 1458.

A short time later, the 11th Circuit clarified its en banc opinion in Mann. Stewart v. Dugger, 847 F.2d 1486, 1492 (11th Circuit 1988). There it concluded that the paramount feature of the court's instructions was that the jury and prospective

---

[7]The jury should proceed with "due regard to the gravity" of the matter and should "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment." The court in this case read a similar instruction (T 2377).

jurors should not be misled about their role in Florida's capital sentencing scheme. Specifically, the court held

> On the other hand, the function of the jury and of the individual jurors must not be belittled by misstatement of the law. The defendant is entitled to have the jury made fully aware that the results of the sentencing deliberations will play an important part in the sentencing process.

Id.

The Stewart court found no Caldwell problem because during voir dire, defense counsel had repeatedly told a hesitant juror that the court did not have to follow the jury's recommendation. "She can do whatever she wants." Id. at 1493.[8] Significantly, the court was willing to look beyond the court's penalty phase instructions to discern whether the jurors had ever been told about their role in the death sentencing process.

B. This case.

In this case the prosecutor said nothing like the one in Caldwell. Neither did Defense counsel make statements as the one in Stewart did. The problem is that neither the defense, the prosecution, or the court at any time, during voir dire, closing arguments, or penalty phase instructions, ever told the jury the significance of their recommendation to the sentence Knowles would ultimately receive. During voir dire, there was

---

[8]Defense counsel evidently wanted to relieve the anxiety a troubled prospective juror had about voting for a death sentence.

extensive inquiry into the prospective juror's death penalty views, but no one ever told them what weight the judge was required to give the jury's recommendation. Similarly, the closing arguments of both the state and the defense focussed on the application of the various aggravating and mitigating factors arguably presented by the facts of the case. At no point did either side tell the jury that the court had to give their recommendation great weight and under only very unusual circumstances could he ignore it. Finally, the court never told the jurors what significance he would have to give their vote.

The jury, thus, was misled by the total silence on the importance of their recommendation to the ultimate sentence Knowles would have received. In no important way was "the significance of its recommendations [] adequately stressed." Pope. at 805. To the contrary, the complete silence on this issue from the selection of the jury to the reading of the penalty phase instructions left the jurors to rely on their collective unchecked discretion as to what significance the trial court would attach to their vote.

In this case, allowing such wanderings fatally undermines the reliability of the jury's recommendation. One juror cried during the medical examiner's testimony (T 817). A defense witness was threatened (T 1015-18). The jury may have very well recommended death, not because they believed Knowles deserved to die, but as the court in Sochor explained, to send him a message. Sochor, at 331. Without the court giving the

jury limiting instructions suggested by defense counsel in this case there can be no assurances that the jury, relying on its unguided reasoning, recommended death because they believed Knowles deserved to die. Thus, the trial court erred in failing to instruct them as the defendant requested, and because cases such as this require a heightened level of scrutiny, there are no sound assurances that the sentencing discretion used by the jury in this case was exercised in a responsible and reliable manner.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE XII

THE COURT ERRED IN NOT FINDING IN MITIGATION THAT KNOWLES SUFFERED FROM AN IMPAIRED CAPACITY, SECTION 921.141(6)(f), AND IT FAILED TO EXPRESSLY EVALUATE IN ITS WRITTEN ORDER THE MITIGATING CIRCUMSTANCES PROPOSED BY THE DEFENDANT, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Knowles to death the court refused to find in mitigation that his conduct was substantially impaired as recognized by section 921.141(6)(f):

> FACT:
> Randall Scott Knowles was examined by three psychiatrists and two psychologists, who testified at the trial of this case. The weight of credible testimony and the conduct of the defendant before and after the murders indicate that he appreciated the criminality of his conduct and his ability to conform his conduct to the requirements of law was substantially impaired.
>
> CONCLUSION:
> There is no mitigating circumstance under this paragraph.

(T 2412).

The court also found, as nonstatutory mitigation, that

> Randall Scott Knowles, had a limited education, had on occasion been voluntarily intoxicated on drugs and alcohol, had two failed marriages, has a low average intelligence, has a poor memory, had inconsistent work habits, and loved his father. . . .

(T 2413).

The court erred in not finding the statutory mitigating factor applied, and it further erred in not evaluating the nonstatutory mitigation presented.

This court's opinion in Campbell v. State, 571 So.2d 415, 418-19 (Fla. 1990) controls on both points. In that case, the defendant stabbed the first victim several times when he answered the doorbell Campbell had rung. The victim's daughter came to the door when she heard her father's grunting and groaning, whereupon Campbell stabbed her three times before returning to the father. When the woman tried to help her father, the defendant had stabbed her several more times, and she fell to the floor as if dead. Campbell then rummaged through the house taking an undetermined amount of money before leaving. The father died, but his daughter lived.

On appeal, this court found that the trial court had erred in failing to find that Campbell did not suffer from an impaired capacity as defined by section 921.141(6)(f) Florida Statutes (1985).

> Evidence of impaired capacity was extensive and unrefuted-Campbell's I.Q. was in the retarded range; he had poor reasoning skills; his reading abilities were on a third-grade level; he suffered from chronic drug and alcohol abuse; and he was subject to a borderline personality disorder. We note that he attempted suicide while in jail and subsequently was placed on Thorazine, a high potency antipsychotic drug. The trial court erred in failing to recognize the presence of this mitigating circumstance.

Id. at 418-19.

In many ways Knowles is very similar to Campbell. Although his I.Q. was not in the retarded range, it was in the borderline category (T 1441). Not surprising, he had dropped out of school officially in the seventh grade, but judging by

his grades he probably had done so years earlier (T 926). Like Campbell, he was a chronic drug and alcohol abuser, and he suffered from an antisocial personality disorder (T 1501). All of the experts that had examined Knowles unanimously concluded he was brain damaged (T 1108, 1244, 1329, 1452, 1500), which meant that there was a chronic "disruption in brain function, higher brain function, of an organic type." (T 1108, 1110).

The lay testimony supports those analyses. Alice Pitts saw him within a half hour of the shootings, and she said he was acting "like he was completely gone. He just sat there and stared at me." (T 1072) That he was "completely gone" finds some support in the strange statement he made to the convenience store clerk that "Rehabilitation made me do what I did tonight." (T 846) Likewise, the next morning he still had not emerged from his toulene and beer induced stupor because when he talked with Glenn Roberson, he admitted that he had "kicked in a trailer door" and "shot a bunch of mother fuckers." (T 867) One of them may have been his father, indicating that he had probably been hallucinating when he shot Carrie Woods and completely out of control when he shot his father.

The trial court, had it made the proper analysis, should have found that Knowles' capacity to appreciate the criminality of his conduct was substantially impaired.

In Campbell, the trial court also ignored or summarily rejected other mitigation the defendant had presented.

As this case demonstrates, our state courts

> continue to experience difficulty in uniformly addressing mitigating circumstances under section 921,141(3), Florida Statutes (1985), which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances."

Id. at 419.

To correct that problem, this court said:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether in the case of nonstatutory factors, it is truly of a mitigating nature.

Id.

As is evident from the quote of the trial court's finding regarding the nonstatutory mitigation, the court in this case did not follow the dictates of Campbell. It did not "expressly evaluate in its written order" the mitigation it recognized. For example, it made no evaluation of the mitigation that Knowles had "on occasion been voluntarily intoxicated on drugs and alcohol." Nor did it adequately consider how his "low average intelligence" or his "poor memory" might mitigate a death sentence. Merely listing what it found in mitigation without any evidence the court gave them serious consideration does not satisfy this court's "expressly evaluate" requirement, nor does it comply with the federal constitutional limitations in capital sentencing. Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). See, Paul Beasly Johnson, Case No. 72,694 (Fla. October 1, 1992) ("Here the

trial court fully considered and discussed the mitigators that Johnson argued applied to his committing these murders.") When the trial court has merely listed the mitigation without also engaging in any serious character analysis of the defendant it has unconstitutionally minimized the importance of what the defendant has presented and has skewed the reliability of the sentencing proceeding an unacceptable amount.

The court erred in not finding that Knowles' capacity to appreciate the criminality of his conduct was significantly impaired, and it also failed to "expressly evaluate" the mitigation he presented. This court should reverse the trial court's sentence and remand for resentencing.

ISSUE XIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE STATE HAD TO PROVE THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES, THEREBY REQUIRING KNOWLES TO PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

At the penalty phase charge conference, counsel for Knowles requested several instructions that essentially asked that if the jury or individual jurors could not decide if the aggravating circumstances outweighed the mitigating, then they should recommend a life sentence (T 1708-20). The court denied that request including specifically requested instruction that would have told the jury that they should return a life recommendation if the aggravation did not outweigh the mitigation (T 1711-12). That was error because what the court told the jury was:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(T 2375).

It was error because of the nine jurors that recommended death in this case, some of them may have done so because the mitigating and the aggravating circumstances balanced each other, rather than that the aggravation outweighed the mitigation. That is, the mitigation may not have outweighed the aggravation, but then neither was it of lesser weight.

Under the instruction given to the jury, the recommendation should have been death.

The United States Supreme Court has not viewed Florida's sentencing process as the court instructed in this case.

> As noted, Florida is a weighing state; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances.

Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812, 824 (1991) (citations omitted).

Indeed, the nation's high court referred to two of this court's decisions to support that statement. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981).

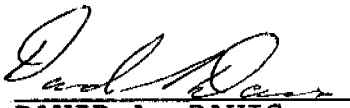
Of course, this is a subtle difference, and one that in any other situation may have been passed off as harmless error. Capital cases, as this court must weary of hearing, are different, and they require heightened levels of reliability. Errors which may have been ignored in a non-capital setting assume greater significance in a capital trial because so much more is involved. Thus, what the court told the jury in this case was error, and because it reduced the confidence we have in the correctness of the subsequently imposed death sentence, it is reversible error.

CONCLUSION

Based on the arguments presented in this brief, the appellant, Randy Knowles, respectfully asks this court to 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence of death and remand for a new sentencing hearing, or 3) reverse the trial court's sentence of death and remand for imposition of a sentence of life in prison without the possibility of parole for 25 years.

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 U.S. Mail to Sara D. Baggett, Assistant Attorney General, 2020 Capital Circle S.E., Suite 211, Tallahassee, Florida, and a copy has been mailed to appellant, RANDALL SCOTT KNOWLES, #122817, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 28th day of October, 1992.

David A. Davis

DAVID A. DAVIS