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IN THE SUPREME COURT OF FLORIDA

CARLIS LINDSEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,933

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARY LEONTAKIANAKOS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0510995

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

The Appellant, Carlis Lindsey, was the defendant in the trial court and will be referred to herein as "Defendant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On May 23 of 1991 at 7:20 a.m., the defendant called the Lake City Police Department to report "finding" two dead people in his home (R 749). The police arrived within minutes and were asked into the house by the defendant (R 711). Inside the middle bedroom, the police found the dead bodies of Lizziette Roe and John Steward. Lizziette was the defendant's girlfriend and John was her brother.

Both victims were killed by a single shotgun wound to the head. The shot that killed John Steward was fired into the right side of his head partly damaging his ear (R 697). One shotgun pellet came out the back part of the left side of his head (R 697). That, along with bone from his skull, lacerated his left ear and the skin on the back of his head (R 702). From inside his head, several pellets and a plastic wad were removed. His brain was macerated (R 700). The medical examiner testified that the muzzle of the shotgun was between one to four feet away from this victim's head when it was fired (R 699-700).

Lizziete Roe was shot in the face. The shot entered her left lower jaw (R 691). It passed through her lip breaking both her lower and upper jaws as well as her facial bones (R 694). The shot severed her spinal cord and medulla (R 694). Several pellets and a wad were removed from the back of the victim's head (R 694-95). The muzzle of the shotgun was within inches of her face when fired. At the time she was murdered, Lizziette Roe was twenty two years old.

John Steward was found lying face down. His face was in a laundry basket with clothes (R 1091). Lizziette was found lying

on her back. Her torso was on top of her brother's legs (R 1091). According to the medical examiner, both victims were killed instantly. The severity of the wounds they suffered would have dropped them like a "sack of potatoes" (R 694, 700).

The defendant told the responding officers that Lizziette and her brother had come over to pick up her clothes (R 712). He claimed to have been awakened by two gunshots at 7:10 a.m. and found the victims dead (R 712). The defendant suggested that it was a murder-suicide (R 714-759). The police, however, found no weapons in the victim's room (R 719) or, in fact, anywhere else in the house (R 760).

The defendant also made a statement to Investigator Billy Carter of the Lake City Police Department. He told Officer Carter that the victims were brother and sister and that they were preparing to move out (R 770). He further told Officer Carter that he was in his bedroom when he heard some shots and went to the bedroom where he found them dead (R 770). The defendant said no one else was there (R 770). The back door was locked from the inside (R 771). All the windows were closed (R 773-74).

Shirley Johnson, the victim's sister, had been with Lizziette all day and had also seen John that afternoon (R 861). Lizziette left Shirley's house with their mother and was to return the next morning (R 863). According to Ms. Johnson, the victim had been living with the defendant on and off and was planning on leaving him (R 863-64). She was going to get her clothes that very day (R 865).

Ms. Johnson relayed an incident that took place a month before the murders. Lizziette was having problems with a blue Honda that the defendant had given her. The victim along with her sister brought the car to the defendant's house and then left on foot. Two men that had been at the defendant's house followed them and stopped to talk. The women were on foot. The men were in their car. As the two women were talking with the men on the side of the road, they saw the defendant come around the corner in the blue Honda. The two men drove off immediately. The defendant was heading straight for them and they had to jump on the sidewalk to avoid getting hit (R 967). The defendant came up on the sidewalk as well. He appeared upset and said something to the victim (R 868). Ms. Johnson testified that she was in fear (R 868) and had no doubt they would have been hit if they had not jumped (R 879).

On May 23 of 1991, between 5:00 and 6:00 a.m., Mr. Tucker, a retired police officer, saw the defendant following a small blue car driven by a woman (R 884 -85). The defendant was driving in a westerly direction away from his house (R 885). He was driving very fast (R 885). Mr. Tucker and the defendant have known each other for about thirty (30) years. Despite that the defendant did not acknowledge Mr. Tucker that morning (R 886).

At about 6:55 that same morning, James Wilson saw the defendant following Lizziette and John. The victims were in the blue car while the defendant was in his wagon (R 903-4). The cars were coming from the direction of the victims' house heading towards the defendant's house. The defendant had both hands on the wheel and was intently focused on what he was doing (R 904-

08). This witness has been friends with the defendant for over thirty years. The defendant, however, did not acknowledge him that morning (R 904).

Lillie Mae Jenkins, a neighbor of the defendant's, also saw him following the victim while heading toward his house (R 925). He was following so closely that when she stopped for a stop sign, he had to swerve to avoid hitting her car (R 925). Ms. Johnson saw Lizziette park her car out in front of the street. The defendant parked in the yard to the left of Lizziette.

Ms. Jenkins noticed that someone else was in the car with Lizziette. She watched all three walk up to the defendant's house. The defendant unlocked the door and let them in (R 928-9). A few minutes later, the witness saw the defendant come back out and move the victim's Honda to the side of the house. The defendant came out of the back door (R 930). She never saw anyone else come in or out. Several minutes later the police arrived. Though Ms. Jenkins was not positive, she believed that the defendant's car was not in the same spot as when she saw him park it earlier (R 931-32, 955).

Ms. Jenkins' husband, Horace Jenkins, also saw the defendant following the blue Honda (R 972-3). Mr. Jenkins recognized the victim, Lizziette. He saw both cars go to the defendant's house (R 975). Mr. Jenkins then went to his job which is a few minutes away. Within fifteen minutes of getting there, his wife called him about the murders (R 976-77).

Another witness, Willie Jenkins, heard a noise that sounded like a gunshot. At trial, Mr. Jenkins testified that he heard this noise sometime after 6:00 a.m.. In his deposition, he

remembered that it was about 6:55 a.m. (R 981). He had also previously testified that he had heard two distinct shots not just one (R 983). This witness denied changing his testimony. He admitted, however, that he heard that the defendant would get even with whoever said things about him (R 999-1000).

William Hamm, a neighbor of the defendant's, had seen the defendant with a twelve gauge shotgun (R 1010). The defendant had shown it to him about one month before the murders and asked the witness for some shells (R 1012-13). Mr. Hamm gave him either two or three.

Alfie Mae Sheppard saw the defendant, at what she estimated to be 7:30 a.m. that morning, drive past her house (R 1038). The defendant was driving fast (R 1038). Ms. Sheppard had never seen him drive like that before. She saw no other cars in front or behind him (R 1038). About fifteen minutes later she saw police cars outside his house (R 1039).

Ms. Barbara Cooper testified that on Easter Sunday, the defendant called her from jail and asked her to testify that he was at her house getting coffee the morning of the murder (R 1052-53). Ms. Cooper lives with the defendant's son (R 1057). Ms. Cooper refused to lie for the defendant (R 1054). A custodian of records for Southern Bell confirmed that a collect call was made from the defendant to Ms. Cooper's house on April 19 of 1992.

When interviewed by Investigator Art Picklo on the day of the murders, the defendant claimed that he was sleeping in his bed when he was awakened by two "shotgun blasts." (R 1150). The defendant told Officer Picklo that he knew it was exactly 7:10

a.m. when he heard these blasts because he immediately looked at his watch (R 1150).

When Officer Picklo asked the defendant about his relationship with Lizziette Roe, the defendant said "she's mine." (R 1157). He also told him that she had spent the night with him and that they had slept in the same bed. He claims that he woke up at 5:30 a.m. and they talked and that he then went back to sleep (R 1151).

The defendant denied going anywhere or driving his car on the morning of the murders R 1154). When confronted with the fact that the hood of his car was warm, he claimed that he went out to check the battery and oil in his car while he waited for the police (R 1153-55). During this car check, he claimed to have started up the engine (R 1153).

The defendant's call to the police was recorded at 7:20 a.m., ten minutes after he claimed to have heard the shots (R 1156). Initially, the defendant told Officer Picklo that he called the police immediately (R 1155). When confronted with the time gap, he claimed to have checked his car before calling the police (R 1155, 1166).

During the defendant's statement, Officer Picklo asked to see the defendant's handkerchief. The defendant pulled it out of his right rear pocket and showed it to the officer (R 1156). When he started to put it back, the Officer asked to hold it (r 1157). The defendant gave it to him (R 1157).

The handkerchief had been neatly folded (R 1157). When Officer Picklo unfolded it, he noticed a stain on it which based on his experience appeared to be gunshot residue (R 1158-60).

The Officer smelled the handkerchief and noted that it smelled like gunpowder (R 1163). An analysis of the stain revealed the presence of lead (R 1203-04). Lead is a substance present in gun powder residue (R 1203-04).

The defendant was finally asked if he had killed the victims. Instead of denying killing them, he said, "I do not recollect that". (R 1164). The defendant did not explain his answer even though he was given the opportunity to do so (R 1164).

Mr. Edard Love, a firearms examiner with the Florida Department of Law Enforcement, examined the pellets and wadding removed from both victims. Mr. Love determined that both were Federal type shells, twelve gauge and that the size was number one buckshot (R 1190-1194). From inside the defendant's residence, several shells were recovered (R 1196-1201). All but two were twelve gauge shells. One was the same as the ones removed from the victims, i.e.: Federal type, twelve gauge, number one buckshot (R 1197-1201).

The defendant took the stand in his own defense. He testified that he knew Lizziette her whole life and that he became romantically involved with her in December of 1990 (R 1252). She moved in with him in January of 1991. According to the defendant, he and the victim got along fine and she was free to come and go as she pleased (R 1253). During that time he bought her a blue Honda (R 1255).

On May 22 of 1991, the defendant said Lizziette left at 4:30 p.m. to spend the night with her sister (R 1256). According to the defendant, she called him from her sister's and was unsure

whether she was going to stay (R 1257). At 11:00 p.m. she showed up at his house (R 1257).

The defendant now claimed to have woken up at 4:30 a.m. on the day of the murders (R 1258). He testified that it was then that he checked the oil and battery on his car. He also recalled changing a gasket on the engine (R 1259). During this pre-dawn car check, he remembered using his handkerchief to wipe the battery posts (R 1260). He then went for a ride to make sure the valve cover was not leaking (R 1260). He was back home by 5:00 a.m. (R 1260).

When he came in he closed the front door (R 1261). Lizzette was sleeping in bed but woke up when he came in (R 1262). They talked for a few minutes and he went back to sleep. Lizziette was still in bed (R 1262).

The next thing he remembered is hearing two explosions in his sleep (R 1263). He now claimed, however, that he did not get up immediately because of his heart condition (R 1263). Instead, he sat on the side of the bed and pondered the situation (R 1264).

When he finally went into the living area, he found the front door open (R 1264). He looked out and the Honda was parked on the street, not the side of the house where Lizziette had left it (R 1265). He looked at his watch and it was 7:10 a.m. (R 1265).

The defendant then went to the middle bedroom and found the victims (R 1266). He tried talking to Lizziette but got no response. He then went back to his bedroom and made several calls to family members before he called the police (R 1268).

He claimed that the responding officers repeatedly questioned him if he had killed the victims (R 1271). He also testified that while they were there, he moved Lizziette's car but only after he told them he would (R 1272). He did this to make more room for arriving police cars.

The defendant denied asking his son's girlfried to concoct an alibi for him (R 1277). He said instead that she misunderstood him (R 1275). The defendant also denied driving by Mr. Tucker's house and going near Anne Maddox Park where Mr. Wilson saw him. He denied showing Willie Hamm a twelve gauge shotgun. He also denied Investigator Picklo's version of his statement claiming that his statement was taped even though a tape was never produced (R 1274).

The defendant also denied telling Officer Carter that the victim was moving out that morning (R 1300). Instead, he maintained that they were discussing getting married (R 1300). On rebuttal, Officer Carter testified that on the morning of May 23, 1991, the defendant told him that the victim and her brother were in the back room moving Lizziette's belongings when he heard the gunshots and found them dead (R 1312-16).

The defendant was convicted of two counts of First Degree Murder (R 1436). After sentencing the same jury recommended that he be sentenced to death by a vote of eleven to one (R 1540). Judge Douglas followed the jury's recommendation and imposed the death penalty. This appeal followed.

SUMMARY OF ARGUMENT

ISSUE I: The trial judge properly admitted evidence of a prior incident between the defendant and one of the victims. The admitted evidence was highly relevant to the defendant's motive for committing these murders. Moreover, by failing to enter a contemporaneous objection at trial, the defendant waived this issue for review.

ISSUE II: The trial judge correctly allowed the state to question its witness about his changed testimony. Any party may attack the credibility of a witness.

ISSUE III: The trial judge correctly admitted evidence that the victim intended to leave the defendant. This evidence was admissible under the state of mind hearsay exception. Moreover, the defendant knew that the victim was leaving him.

ISSUE IV: There was substantial competent evidence of premeditation to support the jury's verdict.

ISSUE V: The defendant's sentence is not disproportionate. The trial judge found two unchallenged aggravating factors, including a prior unrelated murder, and minimal evidence of mitigation.

ARGUMENT

ISSUE I

THE TRIAL JUDGE CORRECTLY PERMITTED EVIDENCE OF A PRIOR ACT BY THE DEFENDANT.

The defense claims that the trial judge improperly admitted evidence of a prior incident between Lizziette Roe and the defendant. A review of the record and the law reveals that this claim is without merit.

During its case in chief, the State presented evidence of a prior incident involving the defendant and Lizziette Roe. Ms. Johnson, Lizziette's sister, testified that the defendant drove a car onto a sidewalk where she and her sister were standing when he saw that they were talking to two younger men (R 867). After stopping the car within a few feet of where they had jumped to, the defendant appeared upset and said something to Lizziette (R 868). There was no doubt in Ms. Johnson's mind that he would have hit them if they had not moved (R 879).[1]

The test for admissibility of evidence is relevancy. Heiney v. State, 447 So.2d 210, 213 (Fla. 1984). Evidence of other crimes, wrongs or acts is admissible if it tends to establish motive, intent, absence of mistake or common scheme. Id. Ashley v. State, 265 So.2d 685, 693 (Fla. 1972). Evidence which has a reasonable tendency to establish the crime charged is not inadmissible simply because it points to other possible crimes. Ashley, 265 So.2d at 693.

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[1] The fact that this incident took place one month before the murders does not make it any less relevant. Evidence of prior acts has been admitted even if it occured years before the crime. Correll v. State, 523 So.2d 562, 566 (Fla. 1988).

The admitted evidence is clearly relevant as it tends to establish motive in this case. The State's theory at trial was that the defendant was so possessive of Lizziette that, when she finally resolved to leave him, he killed her. The incident with the car illustrates this possessiveness and corroborates the other evidence of motive in this case.[2]

Contrary to the defendant's position, finding a motive for these murders was not a problem for the State. The motive was obvious: the defendant killed Lizziette and her brother because she was moving out and he was helping her. The defendant knew she was leaving him. On the morning of the murders, he told the police that Lizziette was moving out that morning and that she and her brother were in the back bedroom packing up her belongings (R 1312-16).

"All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." Ashley, 265 So.2d at 694. This evidence was properly admitted against the defendant as it was highly relevant.

Moreover, even if error, the cautionary instruction given by the trial judge properly channeled the jury's focus in considering this evidence. The jury was specifically told that evidence of other acts is to be considered for the limited purpose of proving motive only (R 860). Both the defense and the State were consulted on the wording of this instruction (R 824-

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[2] When Officer Picklo asked the defendant about his relationship with Lizziette, the defendant said "She's mine." (R 1157).

26). In light of all the other evidence of guilt and motive against this defendant any error was harmless.

Finally, it should be noted that the defendant failed to properly preserve his objection to the introduction of this evidence (R 866-868). The law requires contemporaneous objection to the introduction of objectionable evidence. Lawrence v. State, ___ So.2d ___ (Fla. 1993) 18 Fla.L.Weekly S147. This is required even if a prior motion has been denied. Correll v. State, 523 So.2d 562, 566 (Fla. 1988) cert. denied, 490 U.S. 1028 (1989). By failing to enter a contemporaneous objection at trial, the defendant has waived this issue for appellate review. Id. Relief should be denied.

ISSUE II

THE TRIAL JUDGE CORRECTLY ALLOWED THE STATE TO QUESTION WITNESS WILLIE JENKINS ABOUT HIS CHANGE OF TESTIMONY.

The defendant claims that the trial judge abused his discretion when he permitted the State to question witness Willie Jenkins about his change of testimony. A review of the record and the law reveals that this claim is without merit.

On August 7 of 1991, Mr. Jenkins, a neighbor of the defendant's, testified that at about 6:55 a.m. on the day of the murders, he heard two distinct shots (R 981-983). After the first shot, he went back into his house and then heard the second shot (R 984). On March 12 of 1991, after an all day meeting with the defense, the witness changed his testimony claiming that he was drunk on August 7, 1991 (R 985-987).

At trial, Mr. Jenkins testified that he only heard one noise at around 6:00 a.m. and was not even sure it was a gunshot (R 986). Mr. Jenkins admitted that after his August 7 statement, he heard some people saying that the defendant would get even with whoever said things about him (R 993-1000).

"Any party, including the party calling the witness, may attack the credibility of a witness," Florida Statutes, §90.608 (1990). Despite the appellant's contention, the state did not use this evidence to establish the defendant's consciousness of guilt. Rather, the questions as to what Mr. Jenkins had heard were proper to test his credibility and explain his change of testimony.

Inconsistent statements and the explanation for them can properly be elicited on direct examination. State v. Price, 491

So.2d 536, 537 (Fla. 1986); Bell v. State, 491 So.2d 536, 538 (Fla. 1986). The appropriate inquiry is whether the probative value of these statements is substantially outweighed by its prejudicial impact. Price, 491 So.2d at 537. A review of the record reveals that the probative value of this evidence was not substantially outweighed by any prejudicial impact.

First, the elicited statement was not a direct threat to the witness but rather something he heard (R 999-1000).[3] Second, this statement was not attributed to the defendant. The state never argued or intimated that the defendant had authorized these individuals to make such remarks. In fact, the witness himself testified that there was no direct threat to him and that the statement he heard was gossip (R 1003). Finally, the state did not offer this testimony until after cross-examination by the defense. The defense cross-examined this witness about his change of testimony and in the process, attacked his credibility (R 985-987). On redirect, the witness initially denied hearing any statement (R 988). After defense objection and during a proffer out of the jury's presence, the witness admitted to hearing the statement. The trial judge concluded that the state's line of questioning was proper and that in fact, the defense had opened the door to it (R 997).

Even if error, this testimony was harmless. Koon v. State, 513 So.2d 1253, 1256 (Fla. 1987). In light of all the other

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[3] In Price, this Court held that the objectionable statements far outweighed their probative value. These statements involved the direct threats of a third party that the witness would be shot if he testified against the defendant, a scenario far different than the one here. Id. at 537.

evidence of guilt against the defendant, there is no reasonable possibility that this jury convicted him because of some statement that Mr. Jenkins heard. The only thing the admitted statement did was help explain the witness' change in testimony.

The objectionable statement was not offered for its truth but rather for its impact on the witness. "The fact that a witness has been threatened with respect to his testimony may bear on his credibility regardless of who made the threat." Koon, 513 So.2d at 1256.

If the defense was concerned about the impact of this statement on the jury it could have asked for a limiting instruction. Brumbley v. State, 453 So.2d 381, 385 (Fla. 1984); Sias v. State, 416 So.2d 1213, 1218 (Fla. 3rd DCA 1982). This it chose not to do (R 1007). To now complain that this questioning requires a new trial is improper. Relief should be denied.

ISSUE III

THE TRIAL JUDGE DID NOT ERR IN ADMITTING EVIDENCE THAT LIZZIETTE ROE INTENDED TO LEAVE THE DEFENDANT.

The defendant claims that the trial judge improperly allowed evidence of the victim's intent to leave the defendant. A review of the record reveals that this claim is without merit.

On the day of the murder, Lizziette Roe recruited the help of her brother, John Steward, to help her move her belongings from the defendant's house. In fact, John Steward was shot while tending a laundry basket with his sister's clothes. He fell face down in it and was found that way by the police.

The defendant knew that Lizziette was leaving. He was seen following her to and from her house when she went to pick up her brother. The defendant told the police that on the morning of the murders, the victims were in the middle bedroom packing up Lizziette's belongings. (R 1312-16).

During the State's case in chief, Shirley Johnson, the victim's sister, was allowed to testify over defense objection as to when Lizziette was planning to leave the defendant. The defense did not object to the now complained of testimony that Lizziette was planning to leave. Their objection was to the time frame (R 864-5). As there was no contemporaneous objection to this testimony, the issue is now procedurally barred from appellate review. Leonard v. State, 423 So.2d 594, 595 (Fla. 3rd DCA 1982).

Even if preserved, the testimony was properly admitted. Ms. Johnson's testimony regarding her sister's intent to leave the defendant was admissible evidence of the victim's state of mind

under Section 90.803(1)(a), Florida Statutes. It explains the victim's action of getting her brother to help her with her belongings, unlike the cases cited by the defense where the victim's claims of fear of the defendant were erroneously introduced to establish the defendant's state of mind.

The victim's leaving was a fact, a piece of the puzzle, helpful to understanding why these horrible crimes were committed. The State did not seek to improperly attribute some emotion of the victim to the defendant but rather to supply a reason for these heinous crimes.

Moreover, the State proved that the defendant knew that Lizziette was leaving him. Ms. Johnson's testimony was not a great revelation to the jury as the defendant's own statement established his knowledge of this fact. Therefore, any error in admitting this evidence was harmless. Down v. State, 574 So.2d 1095, 1098-99 (Fla. 1991); Correll v. State, 523 So.2d 562, 565-66 (Fla. 1988) cert. denied, 490 U.S. 1028 (1989); Brunelle v. State, 456 So.2d 1324 (Fla. 4th DCA 1984).

ISSUE IV

THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION.

The defendant claims that the trial judge erred in denying his motion for judgement of acquittal as there was not sufficient evidence from which the jury could conclude that the defendant premeditated the murders of Lizziette Roe and John Steward. A review and analysis of the evidence presented at trial reveals that this claim is without merit.

Both victim's were killed by a single shotgun wound to the head. The shot that killed John Steward was fired into the right side of his head near his right ear (R 697). The muzzle of the shotgun was between one to four feet away from his head when fired (R 699-700). Lizziette Roe was shot in the face (R 691). The muzzle of the shotgun was within inches of her face when fired.

John Steward was found lying face down in a laundry basket with clothes (R 1091). The physical evidence establishes that he was shot first. Lizziette was lying on her back. Her torso was on top of her brother's legs (R 1091). Both victims were killed instantly and fell where they were shot (R 694, 700). There was no evidence of a struggle or a confrontation.

The defendant called the police at 7:20 a.m. to report "finding" the victims dead after being awakened by two shotgun blasts at 7:10 a.m. The defendant told the police that Lizziette and her brother had come over to pick up her clothes (R 770, 712). He could not explain how the murder took place except to suggest that it was a murder-suicide (R 714, 759). No weapons

were found in the room or anywhere else in the house (R 719, 760). The back door was locked from the inside and all the windows were closed (R 771, 773-74).

Lizziette Roe had resolved to leave the defendant on the day of the murder. She recruited the help of her brother John to get her belonging out of the defendant's house. The defendant was seen following the victim to and from her house when she went to get her brother. He was described as following her closely and as being intently focused on what he was doing. His neighbors saw him let the victims in his house. Fifteen minutes before the police arrived the defendant was again seen driving his car. He was alone and driving very fast. The police combed the area but never found the murder weapon.

Evidence of premeditation need not and often cannot be proven by direct evidence. It may be proven by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). A jury is instructed to look at the conduct of the accused and the circumstances of the killing to determine if premeditation exists.

Premeditation can be formed in a moment and need only exist long enough to allow the defendant to be aware of what he is doing and its consequences. Deangelo v. State, ___ So.2d ___, (Fla. 1993) 18 Fla.L.Weekly S236. The trial judge should not grant a motion for judgment for aquittal unless there is no sustainable view of the evidence which the jury might take favorable to the State. Id. A jury is not required to believe the defendant's version when the State has presented conflicting evidence. Id.

In determining whether sufficient evidence of premeditation exists, this Court has recognized five pertinent factors from which premeditation can be inferred: (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 of the wounds inflicted. Holton v. State, 573 So.2d 284, 289 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991). An application of these factors to the facts of this case reveals that there was more than sufficient evidence to support the jury's verdict.

The weapon used in this case was a twelve gauge shotgun loaded with twelve gauge number one buckshot. The defendant correctly concedes that this is a particularly lethal weapon. Moreover, the "disappearance" of this shotgun immediately after the crimes is inconsistent with a heat of passion killing. The defendant had the presence of mind to remove the evidence, call the police to report his "findings" and compose himself in a matter of minutes.

There is no evidence of provocation or any type of struggle in this case. No weapons were found on the victims. The way the victims were found indicates that they were shot while gathering Lizziette's clothes. John Steward probably did not even know what hit him as the shot was fired into the right side of his head and dropped him where he stood, into a basket of clothes.

The only evidence of previous difficulties between the parties was the defendant's possessive behavior. Ms. Johnson, the victim's sister relayed an incident where the defendant

became upset that Lizziette was talking to other men and drove a car onto the sidewalk where she was standing nearly hitting her. When asked about his relationship with the victim, the defendant told the police: "She's mine." There is no evidence that the defendant had any previous difficulties with John Steward.

The manner in which the homicides were committed is also telling. John Steward was shot first in the side of the head. The only reason to kill John Steward first was to prevent him from coming to the aid of his sister. The defendant also conveniently eliminated the only possible witness to Lizziette's murder.

When John Steward was shot, the barrel of the shotgun was one to four feet away from his head. Conversely, the barrel was within inches of Lizziette's face when the defendant shot her. This indicates that the defendant was able to move in closer when shooting Lizziette having eliminated the possible threat of her brother. The force of the shot to her face pushed her backwards and she fell on her back landing on her brother's legs.

The most telling evidence in this case is the nature and manner of the wounds inflicted. Both victims were killed by a single shotgun blast to the head. This scene did not evince the results of a wild shooting but rather the methodical precision of execution style killings. There is no question that the defendant wanted these victims dead. There is an enormous amount of deliberation required to raise a shotgun to the head of another human being and to pull the trigger. This the defendant did not once, but twice.

The jury that heard the evidence and evaluated the defendant's statements decided that he was guilty of two premeditated murders. On appeal, the State is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. Buenoano v. State, 478 So.2d 387, 390 (Fla. 1st DCA 1985) review dismissed 504 So.2d 762 (Fla. 1987). A jury's verdict will not be disturbed when there is substantial competent evidence to support it. Rose v. State, 425 So.2d 521, 523 (Fla. 1983). As there is substantial competent evidence to support this jury's verdicts, the convictions must be upheld. Relief should be denied.

ISSUE V

THE DEFENDANT'S SENTENCE IS NOT DISPROPORTIONATE.

A jury of his peers recommended that this defendant be sentenced to death for the murders of Lizziette Roe and John Steward by a vote of eleven to one. Judge Douglas after weighing the aggravating factors against the evidence of mitigation, followed the jury's recommendation and imposed the death penalty finding that no reasonable person could decide otherwise.

The trial judge found that the State proved two aggravating factors beyond a reasonable doubt: (1) that the defendant had previously been convicted of a violent felony, to wit; Second Degree Murder and, additionally, as to Count II, (2) that the defendant was convicted of the First Degree Murder of John Steward. The court declined to find the defendant's age a mitigating factor[4] and in weighing his poor health, gave it little weight.[5] There was no evidence presented that the defendant was mentally disturbed or acting under any emotional distress.

The defendant wants this Court to vacate his death sentence under the theory that these were "domestic" killings and therefore not worthy of the death penalty. A review of the law

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[4] Age is a factor in every case. It is not mitigation unless it is linked with some characteristic of the defendant such as immaturity or senility. Echols v. State, 484 So.2d 568, 575 (Fla. 1985). In this case, there was no mitigating significance to the defendant's age.

[5] The defendant's poor health did not prevent him from having a relationship with Ms. Roe or committing these murders. The weight to be given a mitigating factor is in the discretion of the trial judge. Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990).

and the record, however, reveals that the defendant's claim is without merit.

There is no evidence to suggest that these murders arose out of some heated domestic dispute as the defense claims. There is no evidence of a confrontation between the defendant and the victims to suggest a heat of passion killing. Certainly, John Steward was not part of any lover's triangle. He was there to help his sister move her belongings. He was killed first, executed by a single shotgun blast to the side of his head, while tending a laundry basket with her clothes.

The only reason for killing John Steward first was to prevent him from coming to the aid of his sister. Also, conveniently for the defendant, by killing John Steward, he eliminated the only eye-witness to Lizziette's murder.

The dispassionate manner of these murders is further illustrated by the quick disappearance of the murder weapon. The victims were killed by a twelve gauge shotgun. No such weapon was found at or anywhere near the scene. The police combed the area looking for it to no avail.

The defendant was seen with a twelve gauge shotgun one month before these murders (R 1011-12, 1106-09). The only "weapons" found in his home on May 23 however, were some inoperable dusty pieces of a shotgun that were not even worth collecting (R 1112). Numerous shotgun shells were found throughout his house.

On his table, the police saw what they though was an open can of gun oil (R 719). The presence of antimony, a component of gunpowder was detected on his hands (R 1124). The presence of lead was detected on his handkerchief (R 1203-04).

The defendant called the police at 7:20 a.m. Sometime after 7:00 a.m. and about fifteen minutes before the arrival of the police, the defendant was seen driving his car. He was alone and driving very fast. When questioned by the police, the defendant denied leaving his house or driving his car the morning of the murders.

The police arrived within a couple of minutes of the defendant's call. The responding officers did not find an emotionally distressed individual but rather a cooperative homeowner. Granted, the defendant claimed to need his medication, but that is just as attributable to his poor health and all the running around he had done that morning as well as a way of evoking sympathy for himself. In fact, after "discovering" the gruesome scene, the defendant had the presence of mind to call a couple of relatives as well as to check his car battery and oil while waiting for the police.

The fact that the defendant killed someone he was romantically involved with does not automatically render the death penalty inapplicable. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 111 S.Ct. 1124 (1991). Rather each case must be evaluated individually. The circumstances surrounding this case establish that these killings were not the culmination of the heated domestic disturbances this Court is mindful of. This defendant cold-bloodedly killed his victims after deciding to do so. He had time to reflect on his actions. No evidence was presented to mitigate the defendant's actions. Rather, he sought to evoke sympathy for himself by focusing on his age and health, factors that had nothing to do with the appropriateness of the death penalty for his crimes.

The cases cited by the defendant are all distinguishable. In none of those cases did the defendant have a prior violent felony conviction, an aggravating factor present in the instant case and deemed significant by this Court in other similar cases. Hudson v. State, 538 So.2d 829 (Fla. 1989), Lemon v. State, 456 So.2d 885 (Fla. 1984); Williams v. State, 437 So.2d 133 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Howard v. State, 375 So.2d 833 (Fla. 1979) resentencing 414 So.2d 1032 (Fla. 1982) (same result).[6] The cases cited by the defendant all involved homicides resulting from long standing domestic disputes, mitigation of severe emotional disturbance and/or substance abuse or situations where this Court has struck the aggravating factors supporting the death sentence.[7]

This defendant has killed before. The life of Lizziette Roe was the third he was convicted of taking. The death penalty is reserved for the most aggravated and least mitigated murders. A proportionality review reveals that this defendant deserves the death penalty.

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[6] In White v. State, ___ So.2d ___, (Fla. 1993) 18 Fla.L.Weekly S184, this Court reduced the defendant's death sentence for killing his estranged lover to life dispute the fact that he had recently been convicted of assault and aggravated battery on her and her new companion. The defendant presenteed unrebutted evidence of drug abuse and psychiatric testimony that (1) at the time of the murder, he was under the influence of extreme mental and emotional disturbance, (2) his capacity to appreciate the criminality of his conduct was substantially impaired. This Court vacated the defendant's sentence because of this extensive evidence of mental mitigation and drug abuse. There was no evidence of mental mitigation or drug abuse in the instant case.

[7] The aggravating factors supporting the death sentences in the instant case are not and cannot be challenged by the defense.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm the Defendant's conviction and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARY LEONTAKIANAKOS
Assistant Attorney General
Florida Bar No. 0510995

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of April, 1993.

MARY LEONTAKIANAKOS
Assistant Attorney General