IN THE SUPREME COURT OF FLORIDA

CARLIS LINDSEY,

Appellant,

v. CASE NO. 79,933

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE THAT AT LEAST A MONTH BEFORE THE MURDERS LINDSEY HAD DRIVEN A CAR ONTO A SIDEWALK AND STOPPED ABOUT 10 FEET FROM WHERE LIZZIETTE ROW AND HER FRIENDS WERE TALKING.

The state says on page 14 of its brief that Lindsey has not preserved this issue for this court's review. Usually, it places this contention at the beginning of its arguments, and that it was the last point it made here suggests that it has little faith in its merits. And on that point it is correct.

The jury had been selected, opening statements made, and several witness had testified when the state sought to introduce Shirley Johnson's testimony. Rather than eliciting the objected to testimony in front of the jury first, the state proffered what she would say and then argued for its admissibility (T 810-823). Lindsey objected to that testimony, arguing that "it's not relevant and it's not material." (T 823). The court overruled that objection and allowed Johnson

to testify as she had done during the proffer (T 824). At the court's request, the state also told the court that it intended to call her "about three witnesses from now" (T 824), but did so after two police officers testified they either took Lindsey to the police station on the day of his arrest or that no firearm was found in his house. Johnson then gave her objectionable testimony.

The state relies on two cases to support it waiver argument. Lawrence v. State, Case No. 76,399 18 Fla. L. W. S147 (Fla. March 11, 1993); Correll v. State, 523 So. 2d 562, 566 (Fla. 1988). In both cases, the state had filed a notice of intent to rely on similar fact evidence, and significantly, in pre-trial rulings the trial court ruled the evidence admissible. Evidently, defense counsel in neither case renewed his objection at trial, and because of that omission, this court refused to review that pre-trial issue.

The rationale for such a harsh rule, especially in a capital case, flows from this court's decision in Castor v. State, 365 So. 2d 702 (Fla. 1978). In that case, this court found that the contemporaneous objection rule

> is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early state of the proceedings.

Id. at 703.

Objections to pre-trial rulings should be renewed to remind the court that a party considers the court's earlier

ruling incorrect. Particularly when the court has made a pre-trial decision, renewal of the objection is crucial. Before the start of trial, the court may not have had a good grasp of the crucial facts, nor may it have realized the overall prejudice the state or defense would suffer as a result of the ruling. Those concerns often have been resolved by the time of trial, so the court can make a more informed decision. It thus just makes good sense to give the trial judge another opportunity to revisit a ruling he may have made days, weeks, or months earlier when he or she (or indeed, another judge) may have had to rule in somewhat of a partial information vacuum.

In this case, Lindsey objected, not at some pre-trial hearing, but at the end of the state's proffer made during the trial. That is a crucial distinction from Lawrence and Correll because by then the court had a good idea what the evidence was or would show and what prejudice either party would suffer by its ruling. Moreover, the two witnesses called immediately after the court had made its ruling offered no testimony relevant to this issue, and their time on the stand could not lasted more than fifteen minutes each.

In short Lindsey contemporaneously objected to Johnson's testimony, and the reasons for demanding this procedural hurdle have been met here.

On page 13 of its brief, the state claims Lindsey knew Lizziette Row was leaving him. What it does not say is that she had previously left him to live with her mother or someone else (T 874). Indeed, she had recently gone to Arcadia to stay

for a while, but had called Lindsey when she wanted to come home (T 811-13). In any event, there was no evidence this time was different, that she was leaving him for good, or that Lindsey knew this.

ISSUE II

THE COURT ERRED IN ALLOWING STATE WITNESS JENKINS TO TESTIFY ON REDIRECT EXAMINATION THAT HE HAD HEARD THAT LINDSEY HAD SAID "HE WOULD GET EVEN WITH WHOEVER SAID SOMETHING ABOUT HIM."

On page 15 of its brief, the state says

> 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.

Mr. Jenkins himself destroyed the relevancy of his testimony regarding the gossip of Lindsey's threats when he declared they had nothing to do with him changing it (T 999-1001).

The state has misconstrued Lindsey's argument on this issue. He is not contending that the problem with Jenkin's testimony is that it was a direct threat against this witness. Nor is he claiming Jenkins ever said the defendant made the threats. Finally, he is not saying he never authorized someone to make the threats for him (Appellee's brief at p. 16).

The primary fault with admitting this testimony was its comment on Lindsey's character or reputation. Whether Lindsey made a threat to get even with those who talked about him is not the main point. What is, is that the local gossip was that he would do so. That amounts to nothing more than displaying the defendant's presumably bad character or reputation for the jury to view, but it was a scene it should not have seen.

The state says, well, Lindsey opened the door to this character attack by questioning Jenkins' credibility.

(Appellee's brief at p. 16) That is, if the defendant attacks the character of a witness, his character can then be attacked. The error of that reasoning is patent. The defendant does not open the door to an attack on his character whenever he attacks the character of a witness.

On page 17 of its brief, the state says "The objectionable statement was not offered for its truth but rather for its impact on the witness." What impact was that? That Lindsey was a mean dude you don't cross. Indeed, you change your testimony to keep on his good side. That impact amounted to an improper display of this defendant's presumably bad character or reputation.

Finally, the state says Lindsey should have asked for a limiting instruction. He did not because he thought only a new trial would cure this error (T 1007). When one's arm has been cutoff one does not ask for a Band-Aid to stop the bleeding. Only a tourniquet will do, and we do not blame the person for not asking for a Band-Aid.

ISSUE III

THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE THAT LIZZIETTE ROW INTENDED TO LEAVE CARLIS LINDSEY.

The state says on page 18 of its brief that this issue is not properly before this court because Lindsey did not contemporaneously object to what he now complains the court admitted. When Shirley Johnson testified, the following crucial questioning occurred:

> Q. Was Lizziette planning to stay living with Carlis Lindsey?
>
> A. She was leaving with him.
>
> Q. And do you know when she was planning on leaving him?
>
> MR. HUNT [defense counsel]: Judge, I object, that's obviously calling for hearsay.
>
> MRS. JOHNSON [the prosecutor]: Your Honor, it's not hearsay under section 90.803 subsection (3), that would be a statement of intent on the part of the declarant, and as such, an exception to the hearsay rule.
>
> THE COURT: I will allow it.

(R 864-65) (emphasis supplied.)

The prosecutor did not view defense counsel's objection as narrowly as the state does on appeal, and that is evident because after the court overruled the objection it re-asked the same two questions.

Moreover, the state expects Lindsey to respond quicker than superman. While trial counsel may be able to "leap tall buildings in a single bound" he is not "faster than a speeding locomotive." Waiting one question to object does not waive the

complaint. Everyone here, as the state's response shows, knew that the scope of the objection extended beyond merely when Lizziette was planning to leave. Indeed, as the state below argued, 90.803 allowed the testimony because "it would be a statement of [Row's] intent." (R 865) There is no evidence, Lindsey's objected only to Johnson's response about when Row intended to leave.

On page 19, the state says "The victim's leaving was a fact, a piece of the puzzle, helpful to understanding why these horrible crimes were committed." It supplied "a reason for these heinous crimes." In other words, as Lindsey said in his Initial Brief at page 25, "Row's subsequent conduct achieved relevancy only as it went to prove Lindsey's intent." If evidence of the victim's intent cannot prove the defendant's motive then logically neither can her acts which the hearsay supported. A victim's intent, whether established through words or acts, is irrelevant to prove the defendant's state of mind.

Finally, the state says the error was harmless because the jury learned through another witness, Officer Carter, that Lindsey knew Lizziette planned to leave him (R 1312-14). Lindsey, however, impeached his testimony that Lindsey knew Row intended to leave him (T 1314-15). The jury, therefore, could have disbelieved Carter's testimony on this point if Johnson had not verified it. The court's error, therefore, was not harmless beyond a reasonable doubt.

ISSUE IV

THE COURT ERRED IN DENYING LINDSEY'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRODUCED INSUFFICIENT EVIDENCE THAT HE PREMEDITATEDLY MURDERED LIZZIETTE ROW AND HER BROTHER.

The state, used the five factors identified by this court in Larry v. State, 104 So. 2d 352 (Fla. 1958) and applied by Lindsey in his case, but predictably comes to a different result than the defendant. It does so, however, by speculation and wishful thinking about what the evidence showed.

For example, when considering the nature of the weapon used, it claims that "the `disappearance' of this shotgun immediately after the crimes is inconsistent with a heat of passion killing." (Appellee's Brief at p. 22) It also says Lindsey had the presence of mind to "remove the evidence," call the police, and to compose himself in a matter of minutes.

The illogic of these contentions becomes immediately apparent. Sure, the defendant may have thrown away the shotgun, but why would he do so and then claim the murders were an apparent murder-suicide (R 718-19)? If Row had killed her brother and then herself, what happened to the shotgun she used? As to Lindsey's presence of mind to remove the evidence, he certainly lacked sufficient forethought to remove the crucial items, namely Row's and Stewart's bodies. Moreover, if these murders were coolly planned and coldly executed why did the defendant commit them in his house? In numerous cases that have come before this court, defendants have often taken their

victims to deserted or isolated places to commit their crimes. E.g. Preston v. State, 444 So. 2d 939 (Fla. 1984).

As to Lindsey's composed state of mind, the police that responded to his telephone call, described his speech as rambling (R 721, 766). He was shaking and nervous (R 763). If this was the coldly premeditated murder the state wants this court to accept, surely he would have created a more credible story than the murder-suicide in which he claimed to have been asleep when the homicides occurred. Why could not he have been in another room when he heard the brother and sister arguing which only ended with the two gunshots?

As to the defendant's "possessive behavior," the only evidence of that arguably occurred a month earlier with the car incident. As contended in Issue I, however, that was so ambiguous to have scant relevance. In any event, if the defendant was so possessive why did he let Lizziette go to Arcadia or regularly stay with other people? If he was so possessively jealous, he would have kept much closer control over a girl forty years younger than himself.

The state says the only reason "to kill John Steward first was to prevent him from coming to the aid of his sister." (Appellee's Brief at p. 23) Speculation. Just as likely, he provoke the incident by starting an argument with Lindsey, or he threatened the defendant when he asked Lizziette why she was leaving. This is all speculation. We simply do not know why Stewart was killed.

On the same page, the state claims that after shooting Stewart, "the defendant was able to move in closer" to Lizziette because the gun was only inches away from her when she was shot. Possibly, but just as likely she moved toward Lindsey. Moreover, if the defendant was moving toward the young woman, one would expect her to raise her hands to ward off a shot gun blast. There was, however, no evidence of any defensive wounds on her arms.

The state claims the manner of the shootings shows "the methodical precision of execution style killing." (Appellee's Brief) A precise shotgun killing is something of an oxymoron. Shotguns are dangerous, not only because they are guns, but also because of the scattering of the shot. Moreover, at the close range here one will almost automatically be accurate or precise when one uses a weapon of the type used here.

Finally there is no evidence Lindsey raised "a shotgun to the head of another human being" when he shot Row and her brother.

Thus, the state's argument here as well as at trial fails to provide any explanation beyond speculative surmising about Lindsey's mental state at the time of the homicides. Premeditation must be proven by positive evidence. It is not a default condition all defendants have which the defendant must disprove. This court should, therefore, reverse the trial court's judgment and sentence and remand with directions that the trial court enter judgments for second degree murder in both cases.

ISSUE V

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

On page 26 of its brief, the state says "The presence of antimony, a component of gunpowder was detected on his [Lindsey's] hands (R 1124)." The amount found, however, was about half of what was needed to determine if a weapon had been recently fired (R 1133). Significantly, because this level was so low the police did not conduct a test to determine if barium, another element often found after a gun has been fired, was on Lindsey's hands (R 1125). As to the lead found on Lindsey's handkerchief, it could as easily come from wiping the terminals of the battery in his car (R (R 1155).

The state claims Lindsey was not "emotionally distressed" but was cooperative. (Appellee's Brief at p. 27). What the police found was an old man who gave rambling responses to their questions, and who was nervous and shaking (R 721, 763). To have the "presence of mind" to check a car battery and oil level suggests one whose mind is not very presently attuned to the problems at hand.

Finally, the state says "The circumstances surrounding this case establish that these killings were not the culmination of the heated domestic disturbances this Court is mindful of" (Appellee's Brief at p. 27) How does the state know these killings were not the product of a "domestic" disturbance? It does not, and that is the fundamental problem

that has dogged the state from the beginning of the guilt portion of the trial to the end of the sentencing phase. Three people went into Lindsey's house on the morning of May 23 and only one came out. What they did inside remains a mystery, and no amount of guessing or speculating can hide that fact. Lindsey may have coldly murdered Row and her brother as the state has argued. He may have shot them in an emotional frenzy as he has contended. We simply do not know. Such ignorance cannot support either a verdict of guilt for first degree murder, or a death sentence because the state has the burden in the guilt phase to show Lindsey committed a first degree murder. It has an equally heavy burden in the penalty portion of the trial to establish that the defendant here deserves to die. Since that is an affirmative duty in each instance, the absence of evidence cannot support a guilty verdict, nor can it justify a death sentence.

Since it is that lack of evidence which the state has here, this court must reverse the trial court's sentences of death and remand for imposition of life sentences without the possibility of parole for twenty-five years.

CONCLUSION

Base on the arguments presented above and in the Initial Brief, Carlis Lindsey respectfully asks this honorable court to 1) reverse the trial court's judgment and sentence and remand for either a new trial or imposition of judgments and sentences for two second degree murders, or 2) reverse the trial court's sentence and remand for imposition of life sentences without the possibility of parole for twenty-five years.

Respectfully submitted,

NANCY A. DANIELS
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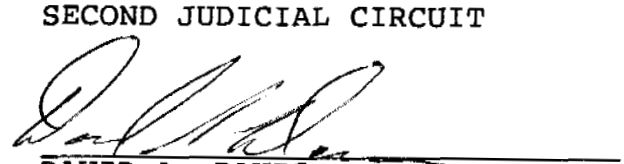
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mary Leontakianakos, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, CARLIS LINDSEY, #122838, Florida State Prison, Post Office Box 747, Starke, Florida, on this 17th day of May, 1993.

DAVID A. DAVIS