IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,278

RONNIE JOHNSON,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

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# REPLY BRIEF OF APPELLANT

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## INTRODUCTION

The appellant was the defendant and the appellee the prosecution, State of Florida, in the lower court. The parties will be referred to as they stood in the trial court. The record on appeal will be referred to by the letter "R". All emphasis is added unless otherwise indicated.

## NOTICE OF ADOPTION

The appellant would respectfully adopt the Statement of the Case, Statement of the Facts and Summary of the Argument of his initial brief.

## STATEMENT OF THE ISSUES

I

WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION?

II

WHETHER THE TRIAL COURT ERRED BY FAILING TO MAKE A FINDING BY PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT's CONFESSION WAS VOLUNTARILY MADE BEFORE SUBMITTING IT TO THE JURY AS EVIDENCE?

III

WHETHER THE TRIAL COURT ERRED BY IMPOSING THE VERDICT RENDERED BY A JURY WHICH HAD IMPROPERLY DISCUSSED EVIDENCE IN THE CASE AND THE DEFENDANT'S GUILT?

IV

WHETHER THE TRIAL COURT ERRED IN AGGRAVATING THE DEFENDANT'S SENTENCE BASED ON THE FACTOR THAT THE DEFENDANT CREATED A GREAT RISK OF DEATH TO MANY PERSON?

V

WHETHER THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT TO THE DEATH PENALTY WHERE THE TWO OTHER CODEFENDANT RECEIVED LESSER SENTENCES FOR THEIR INVOLVEMENT IN THE CRIME?

## ARGUMENT

### I

### THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION

The appellant would rely upon the argument in his initial brief.

## II

THE TRIAL COURT ERRED BY FAILING TO MAKE A FINDING THAT BY PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT'S CONFESSION WAS VOLUNTARILY MADE BEFORE SUBMITTING IT TO THE JURY AS EVIDENCE

The defendant testified that Detective Borrego promised him that "if I would be cooperated with him, I would not get the electric chair" (T. 111). The promise made to the defendant was one that the police knew it could not keep; the intent of the promise was to get the defendant to confess. There was no finding made by the trial court that refuted this specific allegation made by the defendant against the police.

In the instant case, the defendant testified that he was afraid for his family and for this reason, he gave his confession to the police (T. 302). The trial court made no finding refuting this allegation.

Officer Hull testified that his first contact with the defendant regarding the murders was on defendant's grandmother's porch (T. 236). Hull told the defendant that if he (the defendant) was willing to go the crime scene, Hull would take the defendant to it and then return him to his home (T. 238-239). The defendant was misled. How could any guarantee be made to the defendant that he would be returned to his home after he had been taken to the crime scene?

Defendant testified that the police hit him with telephone books (T. 315). The court made no finding refuting defendant's testimony. No findings were made refuting defendant's allegations.

Defendant testified that he signed his confession out of fear for his family; that he was hit in various parts of his body and elbowed by the police when he denied knowledge of the crime (T. 302).

Despite defendant's testimony, the trial court admitted defendant's confession without making any specific findings of fact regarding defendant's allegations. When voluntariness of a confession is at issue, the admissibility of the statement is a question of law which must be decided by the trial court. However, before the trial court can admit the confession, it must resolve any conflict of facts and consider the totality of the circumstances. See, W.M. v. State, 585 So.2d 979 (Fla. 4th DCA 1991).

The court reporter's transcript of the Motion to Suppress hearing reads as follows: "In denying defendant's Motion to Suppress, the trial judge stated:

> As to the motion, the motion to the confession denied. This was done at the homicide office. The Miranda warning is sufficient. Nothing suggests a waiver (sic) of the constitutional rights." (T. 325).

While stating it was denying defendant's Motion to Suppress, the court apparently failed to state words consistent with a denial of defendant's motion

In the absence of the court's specific ruling regarding the credibility of defendant's allegations or a clear finding that defendant had waived his rights under Miranda, it is submitted that the admission of the statement was reversible error.

## III

THE TRIAL COURT ERRED BY IMPOSING THE VERDICT RENDERED BY A JURY WHICH HAD IMPROPERLY DISCUSSED EVIDENCE IN THE CASE AND THE DEFENDANT'S GUILT

During examination on defendant's Motion for Mistrial, Juror Gomez testified that he spoke about the fact that in a way defendant had admitted his guilt with "the white piece of paper", about the traumatic wounds to the surviving victim, the "doctor's opinion" and "other things" (T. 1367, 1368). Juror Gomez further testified that another juror told them they should stop talking about the trial and accordingly, they did (T. 1387). Juror Gomez stated that he spoke to the black man, who sat next to him during the trial (T. 1388). This juror was identified as Juror Preval (T. 1389).

When questioned, however Juror Preval denied the existence of any conversations whatsoever between himself and Juror Gomez (T. 1390, 1391). Juror Preval's testimony contradicted that of Jurors Layov and Gomez. Despite this fact, Juror Preval was not dismissed from the jury panel.

Jurors Blanca and Gomez admitted that the jurors had conversed among themselves and testimony established that questions which should have been addressed in open court to the trial judge were at the very least asked among the juror themselves.

The fact that Juror Preval denied that any conversation took place should have raised a question in the judge's mind regarding whether or not any juror had been influenced by another juror. The trial court chose to deny defendant's motion for mistrial, finding no prejudice to the state or the defendant had occurred as a result of the jurors' conversations.

It is submitted that the trial court erred by denying defendant's motion in view of the fact that one juror clearly lied about the existence of the entire situation, this juror's intentional misrepresentation to the court under oath should have confirmed juror misconduct rather than resolved all questions regarding this matter. See, Wilding v. State, 21 F.L.W. S213 (Fla. May 16, 1996).

The trial court's failure to declare a mistrial in the instant cause was reversible error.

## IV

THE TRIAL COURT ERRED IN AGGRAVATING THE DEFENDANT'S SENTENCE BASED ON THE FACTOR THAT THE DEFENDANT CREATED A GREAT RISK OF DEATH TO MANY PERSON

Josias Dukes testified that he was present at the Victim's grocery store the night of the crime. Further he testified that while out in the parking lot where the shooting took place, he saw Ingraham (the man with the Uzi) fire several shots at the victim (T. 975). Dukes testified that after the Victim and Bernard Williams had been shot by the man with the Uzi (T. 976), the defendant exited the store and fired two shots at the victim (T. 979).

Juanita Myers testified that the shooting was begun by the man with the Uzi who fired at the victim from the victim's head to his toes (T. 951, 955). She saw the defendant shoot at the store (T. 956) while she, Bernard Williams and the victim were outside in the parking lot.

Bernard Williams testified that it was the man with the Uzi who shot him in the head (T. 1000).

At the time defendant shot at the store, Valerie Briggs was the only person in the store, and the only person located in the direction at which defendant shot. It has been held that the

degree of risk must rise to the level of a high probability; it must be more than high possibility or mere speculation. See, Diaz v. State, 513 So.2d 1045 (Fla. 1987); Kampoff v. State, 371 So.2d 1007 (Fla. 1979).

In Diaz v. State, this court dealt with a scenario wherein the defendant fired shots over a patron's head which ricocheted off a mirror and finally landed in the ladies' dressing room. No risk of harm to many persons as an aggravating circumstance was upheld because the court found the probability of risk was not sufficiently high to support enhancing the sentence on this basis. Valerie Briggs was hiding under a counter when shots were fired at the store front. Testimony presented established that one bullet entered the store and landed in a counter close to where Valerie Briggs was hiding. It is submitted that the risk of harm to Ms. Briggs was speculative and not highly probable, possible but not highly probable.

Again it is submitted that the law requires that the risk of harm be to "many" persons and that the risk must be highly probable, not highly possible nor speculative.

Testimony shows that defendant fired at the store when the other witnesses were at the opposite end of the parking lot, that the defendant fired into the victim's body when the victim lay on the ground and that the defendant shot at Bernard Williams who was standing alone at the time.

Based on the facts of this case, the improper consideration of risk of great harm to many persons having been created by defendant requires that the death penalty be vacated and this defendant resentenced.

V

THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT TO THE DEATH PENALTY WHERE THE TWO OTHER CODEFENDANT RECEIVED LESSER SENTENCES FOR THEIR INVOLVEMENT IN THE CRIME

The state argues that the defendant was the person initially contacted by Robinson to "spray" the store, because he contracted with Ingraham and Ferguson to aid in the commission of the crime was the contact person, and that he is the most culpable of the three co-defendants and therefore deserves receiving the death penalty. It cannot be argued that defendant forced co-defendant Ingraham to participate in the crime. In cannot be argued that defendant forced co-defendant Ingraham to use the Uzi in the commission of the crime. Rather, testimony established that the initial plan among the co-defendants was that the defendant would use the Uzi. However, Ingraham changed the original plan and it was he who used the Uzi the night of the crime. Inspite of Ingraham's deep involvement in the crime, it as defendant who received the death penalty on the basis that he was the most culpable, and Ingraham received life imprisonment.

No testimony was presented that established that either of the two shots defendant fired at the victim were the cause of his death.

Yet testimony established over and over that it was Ingraham's shots that initially felled the victim and that after this had been accomplished; Ingraham shot several times from head to toe into the victim's body.

In its Answer Brief on page 79, the state argues that the defendant orchestrated a scheme to "spray up the store", that he knew the employees would be present at the victim's store, and that although he saw other witnesses present, he continued to execute his plan.

Defendant testified that when the three men discussed the crime, it was planned that it would be he who would be firing the Uzi. However, it was Ingraham who took control of the Uzi. However, the state argues as if Ingraham was under complete control of the defendant. Apparently, this was not the case.

In the instant case, Ingraham and the defendant could at the least be said to be equally culpable for the death of the victim. Where two co-defendant are equally culpable for a death, the disproportionate sentence of death must be vacated. See, Curtis v. State, 21 F.L.W. S442 (Fla. October 10, 1996).

Defendant's sentence of death must be vacated and this matter remanded for the proper sentencing procedure.

## CONCLUSION

Based upon the foregoing facts, arguments and authorities, the appellant Respectfully submits that his convictions must be Reversed, Sentences Vacated and this Cause Remanded for appropriate proceedings.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 444 Brickell Avenue, 950, Miami, Florida 33130, on this 31 day of December, 1996.

Respectfully submitted,

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