IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,987

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(904)252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 80,987

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

The appellant relies on the statement of case and facts contained in his initial brief as an accurate and complete statement.

Further, the appellant objects to the state's statement of case and facts as unduly repetitious and not clearly indicating any areas of disagreement with the appellant's statement of facts. Rule 9.210(c), Florida Rules of Appellate Procedure, provides that in the answer brief the statement of facts "shall be omitted unless there are areas of disagreement, **which should be clearly specified.**" See also Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Metropolitan Life and Travelers Insurance Co. v. Antonucci, 469 So.2d 952, 954 (Fla.

1st DCA 1985). Notwithstanding this provision, and notwithstanding the state's acceptance of appellant's statement of case and facts, the answer brief contains a completely rewritten sixteen-page statement of the facts which does not indicate the areas of disagreement with the facts contained in the initial brief.

This flaw in the state's brief makes it extremely difficult for the appellant and the Court to determine which facts are in dispute. It wastes precious attorney and Court time to pour over the state's factual recitation to determine where, if at all, the state disagrees with the appellant's statement of facts, or has additional matters not included in the initial brief.[1] This situation is further compounded by the fact that the answer brief's statement of case and facts is extremely disjointed. For example, in the first seven pages of the brief, the state switches back and forth between the January 4th and January 18th incidents no less than six times, sometimes in mid-paragraph.

In addition to the above-stated objections to the state's case and facts, the appellant specifically would correct

---

[1]This office is becoming increasingly concerned over what appears to be a trend with the Daytona Beach Attorney General's Office to flagrantly violate this rule by rehashing facts in its answer briefs rather than merely pointing out areas of legitimate disagreement over the facts, as is required. In addition to the instant case wherein the state had a sixteen-page rehash of the facts, see also the statements of case and facts contained in the state's answer briefs in Castro v. State, Fla. Sup. Ct. Case No. 81,731 - **9 pages**, Wuornos v. State, Fla. Sup. Ct. Case No. 81,051 - **37 pages**, Fennie v. State, Fla. Sup. Ct. Case No. 80,923 - **18 pages**, Hendrix v. State, Fla. Sup. Ct. Case No. 79,048 - **18 pages**, and Barrett v. State, Fla. Sup. Ct. Case No. 78,743 - **71 pages!**

or clarify the answer brief's statement of case and facts as follows: On page 3 of the answer brief, the state has the sequence of events as recounted by Timothy Johnson listed incorrectly. As shown on T 497, Tim attempted to shoot the defendant with the rifle and struck him on the head immediately upon discovering Dusty and his mother fighting in the yard, not much later as stated by the answer brief.

Secondly, on page 9 of the answer brief, the state misstates the medical examiner's testimony as saying that the victim "would probably have lived 10-15 minutes after receiving the stab wounds." (Answer brief, p. 9) However, the medical examiner's testimony was that she would "**not have lived longer than** ten to fifteen minutes" (implying that she could have lived a much shorter time than that outside limit). (T 747) (emphasis added)

The state, on page 14 of its brief, recounts details of a psychologist's testimony from the penalty phase, but omits the important conclusion. The doctor concluded, based on the tests and interviews, that the defendant thinks and thinks about his feelings, but does not know how to deal with them. It is only under the impact of very severe stress or very prolonged stress that the defendant insists on his own way or explodes. (R 197) Similarly, the state recounts testimony from the psychologist that the defendant "knew that killing Karen was wrong and Spencer would have understood the possible consequences," (Answer brief, p. 14), but omits the same doctor's testimony from the same

record page that at the time of the murder, even though Dusty knew right from wrong, "his ability to conform his conduct to the requirements of the law was impaired." (R 204) This conclusion was based on:

> the severe impairment in his reality testing that he undergoes when he is under sever emotional stress, because again, of his developmental -- in the development of coping ability. Of the ability to handle his emotions. That, combined with the effects of chronic substance abuse, and actual drunkenness, over the days preceding this event.

(R 204)

SUMMARY OF ARGUMENT

Point I. The state failed to present testimony establishing beyond a reasonable doubt that the killing here was premeditated. Rather, the evidence shows that the killing resulted from a domestic dispute, whereby the defendant, in a fit of rage and passion, killed his wife. Thus, the evidence, as a matter of law, only establishes second degree murder. The trial court should have granted the defendant's motions for judgment of acquittal.

Point II. The charges contained in the first two counts were completely separate from the charges contained in the second two counts. The trial court erred in denying the motion to sever those counts.

Point III. The trial court committed reversible error by refusing the defendant's requested instruction on premeditation and by giving the erroneous standard instruction on reasonable doubt. The standard instruction on premeditation was inadequate in the instant case and the requested instruction was a correct statement of the law which would have correctly guided the jury in its deliberations on Count I.

Point IV. The state attorney improperly commented, during argument to the jury, on matters not in evidence (which had been correctly excluded by the trial court), which matters were irrelevant as relating to the victim's state of mind and were highly inflammatory.

Point V. The trial court erroneously allowed the state

to introduce evidence at the penalty phase of the trial of hearsay statements of the victim to police regarding a December 10 and 11, 1991, incident. The hearsay statements deprived the defendant of his right to confrontation. Further, the alleged incident was too remote in time to be relevant to the aggravating factor of cold, calculated, and premeditated, especially since the victim invited the defendant back to live in their marital home between December 10th and the killing.

Point VI. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

Point VII. Section 921.141, Florida Statutes (1991), is unconstitutional for a variety of reasons.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE SURROUNDING THE DOMESTIC KILLING WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH PREMEDITATION.

The state claims that the issue of the state's failure to prove premeditation was not preserved for appeal. (Answer brief, p. 21) The appellant disagrees. The defense attorney specifically stated, in making his motion for judgment of acquittal, that the state "has failed to show a prima facie case of **premeditated** murder in count two." (T 1009) While defense counsel could have been a little more detailed and specific in his motion, it is sufficient to preserve the issue for appeal. Even if not adequately presented to the trial court, this Court may consider this point under the doctrine of fundamental error. "Conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below." K.A.N. v. State, 582 So.2d 57, 59 (Fla. 1st DCA 1991). See also Valdes v. State, 621 So.2d 567, 568 n.1 (Fla. 3d DCA 1993); O'Connor v. State, 590 So.2d 1018 (Fla. 5th DCA 1991). Additionally, this Court has a separate duty imposed by statute and rule to review the sufficiency of the evidence in a capital case, notwithstanding the raising of the issue below or even on appeal. §921.141(4), Fla. Stat. (1993); Fla. R. App. P. 9.140(f); Jackson v. State, 522 So.2d 802, 808 (Fla. 1988); Combs v. State, 403 So.2d 418, 422

(Fla. 1981); LeDuc v. State, 365 So.2d 149, 150 (Fla. 1978); Sundell v. State, 354 So.2d 409, 410 (Fla. 3d DCA 1978).

On page 22 of the state's brief, there is apparently a typographical error in the quote from the trial testimony. The state claims in its brief that the defendant on January 4, 1992, stated that he was "going to fuck **her** up." The correct quote is, that Karen Spencer had "fucked up [the defendant's] life. Now he is going to fuck **hers** [her life] up." (T 466) This correct quote may have different implications from that quoted in the state's brief.

The state cites Ross v. State, 474 So.2d 1170 (Fla. 1985), and Sochor v. State, 619 So.2d 285 (Fla. 1993), claiming that those facts are identical to the instant case and therefore will support a verdict of premeditation. However, those cases are dissimilar from the instant case in a material aspect. In both Ross and Sochor there was no evidence of a mutual combat, which is present here. As stated in the initial brief, in Williams v. State, 437 So.2d 133, 135 (Fla. 1983), this Court affirmed the first-degree murder conviction on the basis that the evidence did not show any signs of a "struggle or commotion or any acts which might suggest a confrontation of any physical or violent nature between the victim and [the defendant]," indicating that where there is such a confrontation, premeditation may not exist. (See Initial brief, pp. 16-18) Moreover, in Sochor, the Court gave great weight to the fact that the defendant was stopped for a time by a third party during a **sexual assault**,

prior to, and not during, the acts which gave rise to the killing; thus, the Court said, the defendant would have had time for adequate reflection prior to the acts which gave rise to the killing. Here, however, Timothy confronted the defendant during the actual attack which caused the killing; he already saw blood on the victim's face, which the medical examiner said would have been caused by the knife attack (which was the cause of death). Additionally, if the killing occurred after the confrontation with Timothy, Tim's actions of beating the defendant repeatedly with the stock of the rifle (with such force as to cause it to shatter), could have contributed to the rage under which the defendant was acting during the lesser-degree killing.

The evidence here fails to exclude a "heat of passion" killing and therefore would support, at most, a second-degree murder conviction. The evidence clearly supports the conclusion that the murder was the result of a spontaneous, blind and unreasoning reaction to the circumstances leading up to the murder, to-wit: the domestic problems and arguments the husband and wife were having over their marriage and their business, and the quarrel and struggle which obviously occurred as evidenced by the mess in the kitchen, and the defendant being hit in the head with the rifle butt repeatedly by the victim's son. There are signs of a confrontation in the kitchen which continued into the back yard. While the victim's son saw the defendant holding a brick, which he believed the defendant had used on the victim, the medical examiner stated that there were no wounds from the

brick on the victim. Thus, it appears that the victim had armed herself with the brick and that the defendant was merely wrestling it away from her. The physical evidence of injuries is entirely consistent with a violent rage brought on by the confrontation and domestic difficulties between the parties. (See Initial brief, pp. 16-19)

This evidence then certainly creates a reasonable doubt that the defendant is guilty of the premeditated first-degree murder of Karen Spencer. The trial court should have granted the motion for judgment of acquittal on first-degree murder for failure to prove premeditation. Hence, Spencer's conviction for first-degree premeditated murder and the resultant death sentence are constitutionally infirm. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, §§9, 16, 17, Fla. Const.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SEVER CHARGES IN VIOLATION OF THE RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS, AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION.

The appellant takes exception with the state's characterization of both sets of crimes as committed to punish the victim for leaving him. (Answer brief, p. 29) This is pure speculation on the state's part with no evidence to support it, especially concerning the second confrontation between the parties. The evidence shows that, at least on the second occasion, the defendant went to the house to get his car title, which his estranged wife had possession of, and that a confrontation between the two occurred. Similarly, the appellant objects to the state's speculation that the defendant would have killed the victim on January 4th had she not fled the house. (Answer brief, p. 29) First, the jury found that the defendant had no premeditated intent to kill Karen Spencer on January 4th, since they found him guilty of only attempted second-degree murder. Secondly, the defendant turned his attention to Timothy, chasing him into his room and leaving Karen Spencer free to flee the house.

The charges of attempted murder and aggravated battery from January 4, 1992, were not episodically connected with the other charges in this case. The episode involving those two charges was wholly distinct from the episode involving murder and aggravated assault, since each episode involved different offens-

es, different dates, different weapons, and different circumstances.

Hence, the trial court erred in refusing to sever the charges of first-degree murder and aggravated assault from the charges of attempted murder and aggravated battery, thereby violating the defendant's rights to a fair trial and due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16, of the Florida Constitution.

POINT IV.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING THE PROSECUTOR'S IMPROPER ARGUMENT TO THE JURY REGARDING MATTERS NOT IN EVIDENCE IN VIOLATION OF THE RIGHTS TO A FAIR TRIAL BY JURY AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS, AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION.

The state maintains that, despite a specific objection by defense counsel to the improper argument of the prosecutor and a timely, and again specific, motion for mistrial, the issue is not preserved for appeal because the defense did not request a curative instruction. (Answer brief, p. 34) For this proposition, the state cites Ferguson v. State, 417 So.2d 639 (Fla. 1982). However, a careful reading of Ferguson reveals that the problem of preservation in that case was that the objection and motion for mistrial were too general and not specific enough to adequately apprise the trial court of the error being complained of. Id. at 641, **citing** Clark v. State, 363 So.2d 331 (Fla. 1978).

In Clark v. State, the Court held that in order to preserve an improper comment issue for appeal, the defendant must make a timely specific objection and move for a mistrial.

> When there is an improper comment, the defendant, if he is offended, has the obligation to object and to request a mistrial. If the defendant does not want a mistrial, he may waive his objection. The trial may then proceed, but he may not again raise that objection as a point on appeal. If the defendant fails to object or if, after having objected, he does not ask for a mistri-

> al, his silence will be considered an implied waiver. [citations omitted] The important consideration is that the defendant retain primary control over the course to be followed in the event of such error. [citation omitted]
>
> When an objection and motion for mistrial are made, the trial court must determine whether there was an improper comment on the defendant's exercise of his right to remain silent. If the court finds that there was not, the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal.
>
> If the defendant, at the time the improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, object for the first time on appeal.

Clark v. State, 363 So.2d at 335. Therefore, in order to preserve the issue of the denial of a motion for mistrial for appeal, all that is necessary is for trial counsel to make a specific objection, and, if sustained, to move for a mistrial. These actions were taken by defense counsel below; it is contended that a curative instruction would not have cured the error, and hence was not necessary.

The trial court sustained the defendant's objection to the prosecutor's improper argument concerning irrelevant matters which were not in evidence, but denied his motion for mistrial. (T 1041, 1088-1089) The state never once contends in its brief that the argument was in any way proper. This improper argument was highly inflammatory and its presentation to the jury deprived the defendant of his right to a fair trial, an impartial jury, and due process of law. (See Initial brief, pp. 33-34)

The state maintains that the error was harmless, simply stating in conclusory language the mantra that "the evidence of guilt was overwhelming." (Answer brief, p. 36) While it is clear that the defendant killed Karen Spencer, what is not clear is what degree of homicide it was. (See Point I, supra.) The evidence of **first degree premeditated** murder is not overwhelming. The comment was harmful since it might have influenced the jury, through the emotional ploy used by the prosecutor, to reach a more severe verdict than that which they would have reached otherwise. A reversal for a new trial is required.

POINT VI.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The state makes the argument that the trial judge was free to reject the unrebutted testimony of all of the mental experts because their testimony was mere speculation and only conclusory. (Answer brief, p. 51) A simple reading of the one hundred and forty-six pages of detailed testimony of the mental health experts reveals that the state's argument is preposterous. Certainly the 146 pages of testimony was not all conclusory on their part. Instead, as detailed in the initial brief (Initial brief, pp. 10-12, 41-44, 51-52, 56-58) and in the state's own answer brief (Answer brief, pp. 12-14, 16), the mental health experts told of the bases for their opinions, which included interviews with the defendant, testing of him, background information, and details of the incidents. They thoroughly explained the rationale behind their conclusions that the defendant was mentally incapable of experiencing heightened premeditation and of intentionally inflicting a high degree of pain on the victim, and was under extreme mental or emotional disturbance and was substantially impaired so as to be unable to conform his conduct to the requirements of the law. (See, especially, R 163-164, 167-169, 173, 175, 177, 192, 197, 205, 209, 213-215, 246-247, 293-

295, 299-300, 302-307, 310-311, 315-316, 340-355, 360-364, 371-380)

The state, citing Bates v. State, 506 So.2d 1033 (Fla. 1987), contends that a trial court is free to accept or reject the testimony of expert witnesses in a penalty phase. However, that pronouncement in Bates (which was made by only three justices) was based upon a specific declaration by the trial court of its valid reasons for rejecting the testimony: that, in its opinion, the psychologist's testimony was clouded by her opposition to the death penalty and that she did not thoroughly acquaint herself with the facts of the case. Bates v. State, supra at 1035. Here, there exists no valid reasons cited by the trial judge for his rejection of the unrebutted testimony of all of the mental health experts, other than his incorrect assertion (countered above) that their testimony was merely conclusory. The trial court's decision to reject the unrebutted, carefully substantiated testimony and valid conclusions concerning the defendant's impaired mental state and its effect on the defendant's actions was a clear abuse of discretion. Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989). The court's conclusions of no mental impairment is contrary to all of the evidence, and contrary to the test announced in Campbell v. State, 571 So.2d 415 (Fla. 1991). (See Initial brief, pp. 10-12, 41-44, 51-58)

The sentence of death imposed upon Dusty Spencer must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to)

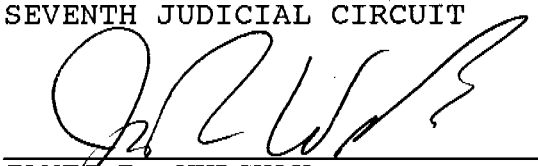
highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Spencer's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments, and Article I, Sections 9, 16, and 17, of the Florida Constitution.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief, the appellant requests that this Honorable Court reverse the judgment and sentence of death and, as to Point I, reduce the conviction to second degree murder, as to Points II, III and IV, reverse the judgments and sentences and remand for a new trial, as to Point V, vacate the death sentence and remand for a new penalty phase before a new jury, and, as to Points VI and VII, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

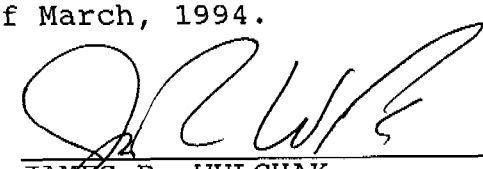
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar # 249238
112 Orange Avenue - Suite A
Daytona Beach, FL 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal; and mailed to: Mr. Dusty Ray Spencer, No. 321031 (45-1264-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 30th day of March, 1994.



JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER