IN THE SUPREME COURT OF FLORIDA

CHARLES FINNEY, :

Appellant, :

vs. : Case No. 80,990

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The state's answer brief will be referred to by use of the symbol "SB". Other references are as denoted in appellant's initial brief. All emphasis is supplied unless otherwise indicated.

This reply brief is directed to Issues I (Parts C and D), II, and III. Appellant will rely on his initial brief as to the remaining issues.

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS OF FIRST DEGREE MURDER, ARMED ROBBERY, AND DEALING IN STOLEN PROPERTY.

C. The Evidence is Insufficient to Prove Felony Murder and Armed Robbery

Initially, the state claims that this issue is not preserved for review (SB28). The state is wrong on several counts. First, appellant objected to the jury being instructed on felony murder and robbery on **exactly** the same ground he is now raising on appeal (T608, 610-12). While it is true, as the state points out, that defense counsel did not argue this theory extensively to the jury (SB28), there is a very good reason for that, since her argument was focused on the state's failure to prove that appellant was the person who committed the crime (T657-92). Defense counsel did make

the point to the jury that the state had failed to prove robbery because it was not shown that the VCR was taken during the course of the assault (T691). Finally, in capital cases this Court is required to review the sufficiency of the evidence whether challenged below or not, and whether challenged on appeal or not. See LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Delap v. State, 350 So. 2d 462 (Fla. 1977); Sundell v. State, 354 So. 2d 409 (Fla. 3d DCA 1978); Fla. Stat. §921.141(4); Fla.R.App.P. 9.140(f).

On the merits, the state (while acknowledging that the prevailing view is to the contrary) argues that a conviction of felony murder does not require a preexisting or concurrent intent to commit the underlying felony (SB29-30). Instead, relying on Commonwealth v. Tomlinson, 284 A.2d 687 (Pa. 1971), the state suggests that it should be enough if the death and the felony occurred during the same criminal episode (SB30-31). Citing LaFave and Scott[1], the state also argues:

> Commentators reject the notion that a perpetrator's intent to commit a felony will supply the intent to kill to sustain a first degree murder conviction, finding this theory to be "pure fiction" and the better practice to recognize felony murder as a category of murder separate from the intent to kill murder.

(SB29)

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[1] LaFave and Scott, Substantive Criminal Law, §7.5(d)(4)(1986).

Not only is the state's position contrary to the prevailing view,[2] it is plainly contrary to established Florida law. In Adams v. State, 341 So. 2d 765, 767-68 (Fla. 1976), this Court wrote:

> In its most basic form, the historic felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device.
>
> Florida has always had some form of the felony murder rule. In 1892, Florida's felony murder rule was first enacted similar to its present form. First degree murder was defined to comprise not only killings done by premeditated design, but also those "committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery or burglary. [Footnotes omitted].

In Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982), the Court emphasized that "[s]ince it is the commission of a homicide in conjunction with intent to commit the felony which supplants the

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[2] See Connolly v. State, 500 So. 2d 57, 62 (Ala. Cr. App. 1985):

> An "impressive majority" of jurisdictions which have considered this question in the context of a felony murder charge have "concluded that an accused is not guilty of a felony-murder where he forms felonious intent only after he commits the killing." . . . [An] accused is not guilty of capital robbery-murder where the intent to rob was formed only after the victim was killed.

See appellant's initial brief, p.45-46, citing decisions concurring in this view from Arizona, California, Illinois, Massachusetts, Michigan, New York, Virginia, Wyoming, and the federal Fifth Circuit.

requirement of premeditation for first degree murder, Fleming v. State, 374 So. 2d 954 (Fla. 1979), there must be some causal connection between the homicide and the felony."[3]

Therefore, without proof of a preexisting or concurrently formed intent to rob, a killing (whether lawful or unlawful) followed by a taking of property is neither felony murder nor robbery. See Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986), rev. den. 503 So. 2d 328 (Fla. 1987), approved in State v. Law, 559 So. 2d 187 (Fla. 1989).

The decisions relied on by the state (SB29-30) are also inapplicable on their facts, since in each of those cases the evidence clearly established that the requisite intent to commit the predicate felony existed at the time of the offense.[4]

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[3] The state's contention that felony murder should be considered as a category of homicide entirely separate from "intent to kill" homicide is easily refuted by the fact that an indictment charging premeditated murder only is sufficient to allow the state to proceed under the alternative theories of premeditation or felony murder. Knight v. State, 338 So. 2d 201, 204 (Fla. 1976); Bush v. State, 461 So. 2d 936, 940 (Fla. 1984); Gwong v. State, 567 So. 2d 906 (Fla. 2d DCA 1990). If felony murder were a separate category of homicide (and since it is obviously not a lesser included offense of premeditated murder), due process would require the prosecution to allege it in the charging document. See M.F. v. State, 583 So. 2d 1383, 1385-86 (Fla. 1991).

[4] In the Pennsylvania case, for example, the defendant gave a written confession to the police and also confessed under oath at trial to the following sequence of events: he entered the victim's house, struck her with a blackjack, took her wallet and cigarettes, raped her, then put a pillow over her face to try to suffocate her. "Failing in this, he stated that he poured . . . lighter fluid on the pillow and set [it] afire in an attempt to insure her death." Smoke inhalation, along with the head injuries, was determined to be a contributing cause of the victim's death. Commonwealth v. Tomlinson, 284 A.2d at 689. In Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987) (SB30), the defendant killed the male victim in (continued...)

D. The Evidence is Insufficient to Prove the Aggravating Factor that the Homicide was Committed for Pecuniary Gain

The state argues that if this Court agrees with appellant that the state failed to prove that the killing of Sandra Sutherland was motivated by financial gain, the Court should then substitute a different aggravating factor which was never suggested below; i.e., that the killing occurred during an armed burglary (SB38). The state's contention is baseless. The prosecution never charged appellant with burglary, and never submitted this as a potential aggravating factor to either the jury or the judge in the penalty phase. The state did not file a cross-appeal. Therefore, just as in Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), the state has not preserved this question for appeal.

Moreover, the evidence in this case did not prove beyond a reasonable doubt that an (uncharged) burglary was committed. The unrebutted evidence was that appellant and Ms. Sutherland were cordial acquaintances and that she had invited him into her apartment on at least one previous occasion.[5] In DeAngelo v. State, 616 So.

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[4](...continued)
furtherance of his preexisting intent to rape the female victim. In Young v. State, 579 So. 2d 721 (Fla. 1991) (SB30), the defendant and his accomplices decided to steal a car. They broke into a vehicle in a condominium parking lot and broke the steering column. The victim (armed, as was Young, with a handgun) came out of the apartments and confronted them. In the ensuing altercation the victim was shot to death; there was conflicting testimony as to who fired first. In each of these cases, unlike the instant case, there was proof of a preexisting or concurrent intent to commit the underlying felony.

[5] Nor does the fact that Ms. Sutherland was tied up necessarily prove beyond a reasonable doubt that appellant -- or whoever (continued...)

2d 440, 443 (Fla. 1993) (a case in which the state properly raised the issue below and filed a cross-appeal), this Court declined to disturb the trial court's failure to find the HAC aggravating factor, because there was conflicting evidence as to the victim's state of consciousness. The Court noted that it was inappropriate to find on appeal an aggravator not found by the trial court except in the limited circumstance where the aggravator is unquestionably established on the record and not subject to factual dispute.

Finally, consideration on appeal of an uncharged criminal offense as an aggravating factor, when the proffered aggravator was never submitted to the triers of fact/co-sentencers below, would be a flagrant violation of due process, since appellant has had no opportunity to defend himself against that accusation. See Presnell v. Georgia, 439 U.S. 14 (1978).

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO PRESENT THE TESTIMONY OF DR. DIGGS THAT HIS OBSERVATIONS AT THE SCENE WERE CONSISTENT WITH AN ACT OF SEXUAL BONDAGE WHICH ESCALATED INTO A HOMICIDE.

The excluded defense testimony here was similar in nature to the testimony given by the defense expert in Bedford v. State, 589 so. 2d 245, 249 (Fla. 1991). In that case, Dr. Fateh testified

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[5](...continued)
committed the homicide -- entered or remained in the apartment without consent and with the intent to commit an offense, especially in light of Dr. Diggs' testimony on proffer that his observations at the scene were consistent with consensual sexual bondage. [See Issue II in appellant's initial brief].

that the injuries to the victim's neck were consistent with erotic sexual asphyxia (the theory of defense), but were also consistent with strangulation. In the instant case, Dr. Diggs testified on proffer that his observations at the scene were consistent with consensual sexual bondage, but were also consistent with the victim having submitted to being bound and gagged out of fear.

If anything, the testimony here was stronger than in Bedford, since in the latter case, Dr. Fateh stated that the cases of erotic sexual asphyxia he had seen involved lone males, and that while it was possible for the phenomenon to occur between a couple engaging in consensual intercourse it would be extremely uncommon. Dr. Fateh also stated that the victim's death was probably not related to erotic activity. Here, on the other hand, Dr. Diggs would have testified that two main possibilities entered his mind when he observed the scene; either a possibly consensual bondage situation, or a situation where the victim may have submitted out of fear. The circumstances, according to Dr. Diggs, were consistent with either hypothesis. Moreover, there were other circumstances which were more consistent with the defense theory than with the state's theory of a murder committed for the purpose of stealing the victim's property, including (1) the presence of acid phosphatase in her rectal area; and (2) Dr. Diggs' opinion that her wounds appeared to be the result of a "frenzic type passion" -- something he would not typically expect to see in a robbery murder situation (T393-98). Also, (3) unidentified caucasian hairs were found on the victim's breast area; these hairs could not have belonged to

appellant, and they were never compared with William Kunkle's hair samples.

Appellant's Sixth Amendment right to present testimony in support of his theory of defense was violated by the trial court's exclusion of Dr. Diggs' testimony. The possibility of consensual sexual bondage is not something which jurors would necessarily consider or understand from their own experiences.

The state also argues that it doesn't matter.

> . . . [S]ince the state did not accuse the appellant of any sort of sexual battery or kidnapping, the state of mind of the victim was simply not an issue relevant to the trial. The fact that Sandra may have been a willing sexual partner does not ameliorate the appellant's violent and greedy acts in robbing and killing her.

(SB44)

The state's argument wrongly assumes that if it ain't part of the theory of prosecution, it ain't relevant. The state had appellant in possession of the VCR, and two of his fingerprints in the apartment; from that they extrapolated the scenario that he must have been the one who killed Ms. Sutherland, and that he did so with the preexisting motive of stealing her property. The defense's theory (which is not only equally "relevant" as the state's, but also one which he had a constitutional right to present to the jury) was that this was not a robbery murder committed by appellant but rather a sexual homicide committed by someone else. The defense presented a number of other witnesses whose

testimony tended to support this possibility.[6] However, without Dr. Diggs' testimony to explain to the jury that the crime scene evidence was consistent with sexual bondage, the defense was unfairly hamstrung in its ability to argue its case.

Moreover, apart from the question of identity, the excluded testimony was relevant to several critical aspects of the case even if it were assumed arguendo that appellant was the one who committed the crime. If the defense had been permitted to show that this may have been a consensual sexual act which escalated into a killing committed in a rage or passion, it would have greatly increased the likelihood of counsel persuading the jury that neither premeditation, nor a preexisting or concurrent intent to commit a robbery, was proved beyond a reasonable doubt. A verdict of second degree murder might well have resulted. In addition, the excluded evidence was relevant as to penalty, to support the defense's position that the financial gain and HAC aggravators should not be found.[7]

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[6] Testimony of Sydney Bales; Brad Ganka; Bernice Phipps; Debra Steger (stipulation); Detective Richard Stanton; FDLE serologist (stipulation).

[7] In their sentencing memorandum, the prosecutors argued, in support of HAC, that although defensive wounds "did not exist on Sandra Sutherland, an even worse fact did. She had no chance of defending herself as she was tied. She could not yell for help as she was gagged. She didn't stand a chance against the Defendant" (R110). The state also argued to the jury that it should give weight to the tying and gagging of the victim as a basis for finding HAC (T905). Because of the trial court's erroneous exclusion of Dr. Diggs' proffered testimony, the defense was deprived of an opportunity to show the jury that the bondage was consistent with a consensual sexual act, and should not contribute to a finding of HAC. Cf. Herzog v. State, 439 So. 2d 1372 (Fla. 1983). [The remaining evidence of HAC was certainly not overwhelming, especially in light of Dr. Diggs' testimony that the victim could have (continued...)

The trial court erred in excluding this significant defense evidence. Appellant's conviction and death sentence should be reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO APPELLANT'S BEING SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THERE WAS NO APPARENT REASON (MUCH LESS A NECESSITY) FOR THE SHACKLING, AND WHERE THE COURT MERELY DEFERRED TO THE WISHES OF THE SHERIFF'S PERSONNEL.

Defense counsel asked for the shackles to be removed, and the trial court overruled his objection (T815-16). Contrary to the state's implication (SB46-47), appellant was not required to object twice.

Shackling is inherently prejudicial and cannot be permitted absent a case-specific showing of necessity. Efforts to ameliorate the prejudice by hiding the shackles from the jury's view may well be an appropriate measure after the judge (not the bailiffs) have determined that shackling is necessary. Trying to hide the shackles is not a substitute for the constitutionally required

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[7](...continued)
become unconscious in thirty seconds to a minute due to rapid loss of blood pressure (T380-83).]

showing.[8] This case is not meaningfully distinguishable from Bello.[9]

Combing the record for an after-the-fact justification, the state refers to a verbal altercation between appellant and a public defender investigator which occurred at the jail a full year before this trial. (R21-28,1051-52). According to the incident report, appellant had invited the investigator to "step into the hall because he was going to beat his ass" (R27). There was no actual physical contact.

The trial judge did not order appellant to be shackled during his penalty trial based on this year-old incident (which amounted to little more than jailhouse tough talk). She simply deferred to the decision of the bailiffs, and the reason (if any) for the bailiffs' decision is unknown. See Bello. If the required independent judicial determination had been made, it is highly doubtful that the judge would have concluded that shackling was necessary because of that incident; especially in light of the fact that she had presided over two lengthy trials in which appellant -- unshackled -- had caused no disruption.

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[8] In addition, as discussed in the initial brief, the trial judge made no finding that the jurors could not see the shackles; she merely asked the bailiff a question which the bailiff misunderstood and did not answer (T816).

[9] Bello v. State, 547 So. 2d 914 (Fla. 1989).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19th day of September, 1994.

Respectfully submitted,

Steven L Bolotin

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

SLB/ddv