IN THE SUPREME COURT OF FLORIDA

KENNETH W. CHAKY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,325

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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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN NOT REREADING ALL THE TESTIMONY OF CHARLIE THOMPSON, WHICH THE JURY HAD REQUESTED AFTER IT HAD BEGUN DELIBERATIONS ON CHAKY'S GUILT, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The state says on pages 31 and 32 of its brief that Chaky invited the court's error here. The court ruled, as the jury had requested, that it would read all of Charlie Thompson's testimony (T 991). It's mistake, then, was not that it rejected what Chaky wanted (that the jury identify what portion of Thompson's testimony it wanted), but that it failed to do as it said it would. That is, instead of having the jury hear all of Thompson's testimony, it acquiesced in the foreman's apparently unilateral decision that the jurors really only needed a portion of it (R 1009). The court rather than giving the defendant any opportunity to object, simply stopped what was being reread, instructed the jury on the elements of first

degree murder (as it had also requested), and had them return to their deliberations. There was no invited error because what the court did, i.e. allowing the foreman to dictate what testimony he believed the jury should hear, was never suggested by Chaky.

Of course, the defendant realizes that he cannot benefit on appeal by creating error at trial. Yet, the rationale justifying the invited error doctrine must be closely examined to see if it applies here. Such scrutiny reveals that a party may not benefit from mistakes that are errors of fact. A trial court has committed no reversible error when the complaining party has misled it on the operative facts. As to matters of law, however, the result is different because the court is presumed to know and apply the law. Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

In Pope v. State, 441 So. 2d 1073 (Fla. 1983), for example, a motion to perpetuate the testimony of one Clarence Lagle was granted because the state anticipated his unavailability for trial. At trial, it offered Lagle's deposition claiming that it had tried but could not find this witness. The defendant said that the witness' testimony should not be read even though it agreed that Lagle was unavailable. That admission of fact foreclosed "the trial court's inquiry into the matter and the state's opportunity to present any other evidence it may have had which would have conclusively shown the exercise of due diligence." Id. at 1076. In short,

when Pope conceded the fact of Lagle's unavailability, it "invited" the court's ruling.

Not so here because even though Chaky's lawyer in the abstract wanted the jury to specify what portion of Thompson's testimony it wanted to hear, he was never given the opportunity to object to the trial court's unilateral decision to go along with the foreman's decision that he had heard enough. That situation further distinguishes this case from Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974) where the trial court on its own offered to give a corrective instruction to the jury, but Sullivan's lawyer refused it. Here, the judge never asked Chaky's counsel if stopping the testimony met with his approval. C.f., Rule 3.390(d) Fla. R. Crim. P. (Regarding the giving of jury instructions, "Opportunity shall be given to make the objection out of the presence of the jury.")

As to the merits, the state argues this court's opinions in Kelly v. State, 486 So. 2d 578 (Fla. 1986) and Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990) are "directly on point." (Appellee's Brief at page 34.) Not so. In Kelly, the jury asked the court about the murder a John Sweet had hired Kelly to commit and whether the former had "anything to gain by his testimony." The court refused to answer the questions posed because, as this court said, "formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation." Kelly at 583. This court, thus held that the lower tribunal committed no error when it

had portions of Sweet's testimony read back that the jury requested.

Kelly clearly has little relevance here. In this case, the jury asked no specific question about Charlie Thompson. Instead it wanted only that all his testimony be reread. The request also required no interpretations by the court, nor did the jury expect the trial judge to comment on the evidence. It would have had to have made no judgments on the evidence.

In Haliburton, the jury asked for "those portions of testimony that deal with the time of the replacement of the jalousies-i.e. Cindy Miller, Mike Bohannon, Roger Miller." Id. at 250 f.n. 3. Haliburton complained when the court refused to reread the testimony of the crime scene expert, but this court found no merit to it because the jury had not requested it. This case, as with Kelly, has little relevance here because the jury in this case made no similar specific request for only portions of Thompsons' testimony. It was, instead, a blanket request for all of it.[1]

The court, therefore, erred when it acceded to the jury foreman's decision that "we have heard what we wanted." This

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[1]The state quoted the Fifth District Court of Appeals in Roper v. State, 608 So. 2d 533, 535 (Fla. 5th DCA 1992)[for the proposition that the "trial judge should have apprised the jury that a method was available to have the cross-examination, or specific portions of it, read to them." That quote, however, was dicta, because the issue the court faced was whether the trial court had erred in refusing to reread any of a witness' cross-examination as the jury had requested.

court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN FAILING TO REDUCE THE JURY INSTRUCTIONS TO WRITING FOR BOTH THE GUILT AND PENALTY PHASE PORTIONS OF THE TRIAL AS REQUIRED BY RULE 3.390(B) FLA. R. CRIM. P.

The state, on page 35 of its brief, says this court "is not in the practice of overlooking a failure to preserve an issue simply because a case involves the death penalty." True enough, but this case and this issue forces this court to re-examine whether the contemporaneous objection rule specifically applies to issues such as this.

The immediate question arises of why should it not? It is a good inquiry, and the answer must come from a close analysis of the United States Supreme Court case of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In that case, John Sykes sought, by way of a petition for a writ of habeas corpus filed in the federal courts, to raise for the first time an issue involving his Fifth Amendment right to remain silent. The United States Supreme Court held that before he could it he must have been first presented it to the Florida courts for them to resolve. Key to that decision was Rule 3.190(i) Fla. R. Crim. P.:

> (1) Grounds. On motion of the defendant or on its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.
> (2) Time for filing. The motion to suppress shall be made prior to trial unless opportunity therefor did not exist for the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

The court accepted the state's interpretation of the rule that:

> Since all of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial, and since their action in so doing is quite consistent with a line of Florida authorities interpreting the rule in question as requiring a contemporaneous objection, we accept the State's position on this point.

Id. at 85-86.

Thus, Sykes hinges on Rule 3.190(i)(2) that explicitly requires Fifth Amendment issues to be raised before trial or the defendant has waived them for further review. There is no similar explicit contemporaneous objection requirement involving trial court's obligation to preserve the jury instructions in writing.[2] Failing to review issues on procedural default grounds should be discouraged, so this court should reluctantly, and then only when some statute or rule explicitly provides, as one did in Sykes, reject an issue because the defendant failed to adequately object to it at the trial level. Thus, without any explicit, specific contemporaneous objection requirement precluding review of the issue presented in this case, this court should consider Chaky's question on the merits.

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[2]There is, of course, the need to object to the court's giving or failure to give specific instructions to preserve them for appellate review, Rule 3.390(d) Fla. R. Crim. P., but the issue Chaky raises here does not involve that problem.

On the merits of Chaky's claim, the state argues this court should adopt an "abuse of discretion" standard as it has done for issues involving Rule 3.400 Fla. R. Crim. P.[3] Courts generally have discretion in making findings of facts and where the law specifically provides for the exercise of the trial court's judgment. For example, Rule 3.400 provides that the trial may permit the jury to take the jury instructions with them when they retire to deliberate the defendant's guilt.

On the other hand, it has no discretion in applying the law. It must apply the law correctly. Failure to do so is error. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). Likewise, when a statute or, as in this case a rule, commands it to do something, the court has no freedom to disregard what the legislature or this court has directed it do. Thus, in this case, Rule 3.390(c) says "Every charge to a jury shall be orally delivered, and charges in capital cases shall, . . . , also be in writing. All written charges shall be filed in the cause." (emphasis supplied.) Nothing in this rule gives the trial court any discretion of whether the instructions can be in writing or not, and if this court finds it does, it will have gutted the rule of any use. C.f., Tascano v. State, 393 So. 2d 540 (Fla. 1981) There is simply no discretionary

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[3]In pertinent part, that rule provides: "The court may permit the jury, upon retiring for deliberation, to take to the jury room: . . . . (c) any instructions given; but if any instruction is taken all the instructions shall be taken. . . "

language in that rule, and this court should not mangle it to put it there.

The state on pages 37-38 of its brief then claims that "the purpose behind the rule appears extinct." Au contraire. If so, why has it not been removed from the rules of criminal procedure. A quick check of the annotated rules reveals that this court amended Rule 3.390 in 1972, 1988, and 1992. Surely, if the Criminal Rules Committee or this court believed the requirement of having written instructions had outlived its usefulness, the provision requiring them would have been removed. Moreover, that the First District refused to follow the law as this court had laid down, as the state contends, hardly provides any convincing precedent. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

Chaky, therefore, asks this honorable court to reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN FINDING CHAKY COMMITTED THE MURDER FOR PECUNIARY GAIN.

The state makes much of Feinberg's claim that Chaky promised to pay Feinberg and Thompson with insurance proceeds for their help in disposing of his wife and her vehicle. (Appellee's brief at p. 43) It is understandable why it does so: it has virtually no other evidence to support this aggravating factor. Yet even this "fact" as with the other proof used to support the pecuniary gain aggravator fails to provide any convincing power.

First, the court never used Feinberg's allegation to support its finding of this aggravating factor. Neither should this court.

Second, Chaky never told Thompson he would use the life insurance proceeds to pay him. Just as likely, he meant to use the money he would have received on the car to pay this man for disposing of his car. Thompson's testimony clearly indicates why he was asked to get rid of the car.

> Q. Had you come to an understanding with Barney Feinberg concerning the defendant's car?
>
> A. Well, it was supposed to have been an Olds, an older Olds, 73 or so, just to get rid of it, an old junker, an insurance deal.
>
> Q. What kind of understanding did you have?
>
> A. Just to get rid of it for insurance purposes.

(T 559)

That Thompson never had any intention in disposing of Patsy Chaky's body for any money regardless of where the defendant got it became abundantly clear when he and his brother discovered it in the trunk of the car. "[A]s I got to the back of the car, I looked down and there was a lady laying there in the car. . . . With my forearm, I closed the trunk. I got exited myself. I didn't know what to do at first." (T 567)

Third, even Feinberg's testimony does not support the state's claim.

> Q. Did he discuss at any time any compensation to you for your assistance?
>
> A. Not at that time.
>
> Q. Did there ever come a time when he did that?
>
> A. Yes, sir. Maybe a week or so after that, he called me on the telephone using an alias of Jack Carson.
>
> * * *
>
> He said the heat was on. He recommended that I leave the area for a couple of days, and the he would take care of me if I kept my mouth shut.
>
> Q. Did he say how he was going to take care of you?
>
> A. The only thing I figured was the insurance money.
>
> Q. Well, did he say insurance money?
>
> A. He mentioned it, yes, sir.

(T 533-34)

So, at the time of the murder, no one mentioned any money, which is strange because one would think Feinberg would have

demanded some payment for his assistance in a crime. Only a week later when the defendant called him to keep "his mouth shut" did Chaky first mention he would take care of him. Thus, when Chaky killed his wife no evidence exists that he did so to collect any insurance. If, as the state contends, it must prove a pecuniary motivation for the murder for the pecuniary gain aggravator to apply, it failed to do so here. In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), the defendant murdered his victim to get his job. The court justified that finding because after committing the murder Clark said "I guess I got the job now." Perhaps more compelling, he went to where the victim worked the next day and claimed his job.

In this case, Chaky never said he killed his wife for any insurance proceeds, and he never applied for them after her death. Clark, like the cases cited in the Initial Brief on this issue, only show how weak the evidence is supporting this aggravator.

The state places great reliance on language found in Zeigler v. State, 580 So. 2d 127 (Fla. 1991). "`We have previously upheld the application of this factor where the defendant became entitled to insurance proceeds on a victim's life. Buenoano v. State, 527 So. 2d 194 (Fla. 1988).' Zeigler, 580 So. 2d at 129 n. 6." (Appellee's Brief at p. 43) While that is an accurate quote from Zeigler, the court did not say that in Buenoano. Instead, supporting the pecuniary gain aggravator, this court found "that as a result of Goodyear's death, Buenoano became entitled to and received life insurance

proceeds and veteran's benefits." Buenoano, at 199. In cases such as Buenoano and Zeigler the distinction between entitlement and receiving the benefits of an insurance policy on the victim becomes insignificant because the defendants' greedy intents were so clear. In this case, however, even though Chaky may have been entitled to the money, he never made any attempt to collect it. That failure is important because it tends to refute the state's claim and the court's finding that he killed his wife for the insurance money. Mere entitlement cannot begin and end the pecuniary gain inquiry because if it did, every married person who has an insurance policy on his or her spouse would receive curious glances from his or her mate as they read the morning paper.

The state, by way of a footnote on pp. 43-44 of its brief, says "Chaky must have suspected that eventually someone would discover his wife's body, and no doubt hope that no one would discover his dirty deed so that he could collect the insurance money." Let's see, now. Chaky wanted his wife's body hidden, but not so well that it would never be found. Then knowing that it would eventually be found, he hoped no one would ever suspect she had been murdered even though he had put the corpse in the trunk of his car. And the state accuses Chaky of "disingenuous speculation." (Appellee's brief at p. 46)

Finally, the state makes its predictable harmless error pitch, but as with the other arguments, it is so slow that Chaky has little trouble hitting it. If the pecuniary gain aggravator is invalid, the only remaining aggravating factor is

his 1971 conviction for trying to kill a man in Vietnam who had threatened him with death. If this crime was as serious as the state suggests, the United States Army would not have reduced his four year sentence (itself lenient) to two years, revoked his dishonorable discharge and given him, instead, an honorable release. In the almost quarter century since then the defendant has lived a law abiding life, marrying, raising a family, working a steady job, and contributing to society. These latter facts strongly mitigate any death sentence, and this court cannot, with an easy conscience, say beyond all reasonable doubts that the jury would have recommended a death sentence, and the court imposed it. This court should, therefore, reverse the trial court's judgment and remand for a new sentencing hearing before a new jury.

ISSUE IV

UNDER A PROPORTIONALITY REVIEW, CHAKY DOES NOT DESERVE A DEATH SENTENCE.

The state, after recounting but not distinguishing the several cases Chaky had cited in his Initial Brief, claims that the "testimony of Hermelbracht, Feinberg, Thompson, Hough, and Chaky himself establishes beyond a reasonable doubt that Chaky killed his wife for pecuniary gain. . . " (Appellee's Brief at p. 53) Hardly. Hermelbracht, the retirement manager for the University of Florida, for example said that about half the university employee's had insurance coverage similar to Chaky (T 698). His yearly increases, moreover, were "pretty standard, pretty normal" (T 702). Feinberg never said the defendant promised to pay him anything (and then it was only that he would "take care of him") until at least a week after Patsy's death (T 533). Thompson believed he would be paid from money Chaky would receive for a lost or stolen car, not from the policy he had on his wife (T 559). Donna Hough, Patsy's cousin made only a vague statement that Patsy and Ken Chaky were have "financial difficulties." (T 721) Bouncing a check is a financial difficulty. Not having enough change to pay a waitress a tip is a financial difficulty. Declaring bankruptcy is a financial difficulty. Hough's vague testimony only

encouraged jury speculation and has virtually no probative value.[4]

On page 54, the state discounts the evidence Chaky and his wife had had a fight leading to her death because it was "Chaky's own self-serving testimony" (Appellee's Brief at p. 54) True he testified in his own behalf, but then what he said was never rebutted or contradicted. Instead, Natalie, his 15 year old daughter, confirmed her mother's violence and father's pacifism (T 1081).

Regarding the prior conviction aggravating factor, the state on page 55 of its brief says "This Court is well aware that remoteness does not affect the aggravating value of this factor." When the other violent crimes the defendant committed occurred may have no bearing on their admissibility. Remoteness, however, does have some importance as to how much weight is given them. Here, an attempted murder committed over twenty years earlier in a combat zone has far less weight than one by a man who had just gotten out of prison for trying to kill a woman. Lemon v. State, 456 So. 2d 885 (Fla. 1984). Chaky left his violence in Vietnam. Lemon carried it with him.

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[4]Chaky rebutted any claim of financial problems when he testified that he had just paid off a loan, had doubled his car payments, and was paying about $60 per month extra on his home mortgage (T 1045).

Moreover, if propensity to commit violent crimes is a valid aggravating factor (Appellee's brief at p. 55), the state showed none here.

Finally, the state notes that "Chaky would have this Court focus on his 'ordinary person status. Initial Brief at 31. Although Chaky might be classified as ordinary in some aspects, i.e., married-with-children, job-holding, and debt-paying, the murder of his wife in no way was ordinary." (Appellee's brief at p. 56. Of course it is not, but he is facing a death sentence primarily for that reason, and killing one's spouse is not enough to justify a capital sentence. A death sentence is not proportionately warranted here. This court should, therefore, reverse the trial court's sentence and remand with directions that it impose a life sentence without the possibility of parole for twenty-five years.

CONCLUSION

Base on the arguments present here, Kenneth Chaky asks this honorable court for the following relief: 1) Reverse the trial court's judgment and sentence and remand for a new trial. 2) Reverse the trial court's sentence and remand for a new sentencing hearing before a jury. Or, 3) Reverse the trial court's sentence and remand with instructions that it sentence the defendant to life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

NANCY A. DANIELS
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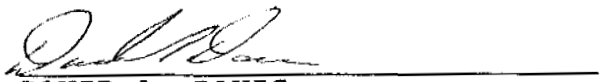
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, KENNETH WAYNE CHAKY, #543523, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 23rd day of September, 1994.

DAVID A. DAVIS