IN THE SUPREME COURT OF FLORIDA

BRETT A. BOGLE,

Appellant,

v. Case No. 81,345

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO REMOVE THE STATE ATTORNEY'S OFFICE FOR THE THIRTEENTH JUDICIAL CIRCUIT AND APPOINT A SPECIAL PROSECUTOR BECAUSE A FORMER DEFENSE COUNSEL WAS LATER EMPLOYED BY THE STATE ATTORNEY.

Appellant contends that a special prosecutor should have been appointed because his lawyer in the original guilt phase, Douglas Roberts, was employed by the State Attorney's Office at the time of the second penalty phase. It is the state's contention that the trial court properly denied the motion to remove the State Attorney's Office in that the lawyer did not either provide prejudicial information related to the pending criminal charge or personally assist in any capacity in the prosecution of the charge.

In general, a lawyer's ethical obligations to former clients generally requires disqualification of the lawyer's entire law firm where any potential for conflict arises. In State v. Fitzpatrick, 464 So. 2d 1184 (1985), this Honorable Court held that where the "law firm" is a governmental agency, "imputed disqualification of the entire State Attorney's Office is unnecessary when the record establishes that the disqualified attorney has neither provided prejudicial information related to the pending criminal charge nor has personally assisted, in any capacity, in the prosecution of the charge." Id. at 1184. In

Fitzpatrick, the disqualified attorney had not had any conversations or contact with state attorney personnel regarding the defendant's case. Under those circumstances, this Court held that the entire State Attorney's Office need not be disqualified.

In Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court reiterated that the State Attorney's Office should not be disqualified if the former defense attorney had no contact with any State Attorney personnel regarding the defendant's case. In Castro, however, this Court ordered a new penalty phase hearing, where the former defense attorney, who had represented Castro in the same case, subsequently became a member of the State Attorney's Office and was called upon to assist in responding to motions against the defendant upon resentencing. This reversal was based solely upon this Court's determination that disqualification of the entire State Attorney's Office is appropriate where the former Public Defender personally assisted the State Attorney's Office against his former client.

In the instant case, however, the trial court denied the motion because she did not find that there had "been any prejudice to Mr. Bogle by sharing of information." The Court also noted that Roberts had represented Bogle only during the first phase of the murder trial and that the court had granted a motion for new trial only as to the second phase. (T. 937)

At the hearing on the motion, Roberts testified that he had spoken to prosecutor Nick Cox one time in the hallway and asked him if the case was set or if it was over yet and that was the

extent of the conversation. (T 938) He further testified that he had not discussed this case with any investigator from the State Attorney's Office or any other members of the State Attorney's Office. (T 938)

Prosecutor Karen Cox testified that she had not had any conversations with Mr. Roberts concerning this case since he became an employee with the State Attorney's Office. She noted that Mr. Roberts worked in intake, rather than the trial division, and in his office was in an entirely different building. Accordingly, she does not see him on a day to day basis and it is rare that they even encounter each other. (T 943)

Prosecutor Nick Cox testified that he spoke to Mr. Roberts approximately a week earlier. He mentioned to Mr. Roberts that they had a second phase of the trial coming up next week. Mr. Roberts said he had a good relationship with Mr. Bogle. Although they discussed phase one of the actual trial, there was nothing that Roberts brought up to Cox whatsoever that he did not already know based from discovery and the trial of the case. Cox stated that he and Roberts were basically talking about the State Attorney's Office, "about Roberts being in intake and things like that and that this case just kind of got meshed up into that." Cox explained that he had said something to Roberts about the closing arguments, noting that a point that Roberts had made in closing was an interesting point. (T 945) Cox noted that they did not discuss this case for more than a couple of minutes. (T

946-48) Based on the foregoing conversation, the trial court found: "Okay. Based on -- I mean, obviously, I would have preferred no conversation to have taken place, but I don't find that if that was the contents of the conversation, that Mr. Bogle could be prejudiced in any way by that." (T 948)

The court then instructed Mr. Roberts to not discuss this case with any member of the State Attorney's Office. (T 949) Again, the court noted that Roberts worked in an entirely different building.

In Meggs v. McClure, 538 So. 2d 518 (Fla. 1st DCA 1989), the First District noted that in order to disqualify a State Attorney, actual prejudice must be shown. Citing, State v. Clausell, 474 So. 2d 1189 (Fla. 1985), approving original opinion, Clausell v. State, 455 So. 2d 1050 (Fla. 3d DCA 1984). Actual prejudice is something more than the mere appearance of impropriety. The court found that it was improper for the circuit court to have disqualified an entire office because of the appearance of impropriety. "An entire office need not be disqualified because one member may have a disqualifying interest. Meggs was not the actual prosecutor in the case and the participation of the Assistant State Attorney actually responsible for the prosecution has not been shown to have caused any prejudice to Wolfe whatsoever." The court also noted that Code of Professional Responsibility makes a distinction between a private law firm and a prosecutor's office so that disqualification of a prosecutor is not required because another

member of the office is called to testify. Id. at 520, citing State v. Fitzpatrick, 464 So. 2d at 1187 (Fla. 1985), and State v. Clausell, supra. See, also, Brown v. State, 455 So. 2d 583 (Fla. 5th DCA 1984).

Thus, the real issue is whether Bogle has shown actual prejudice from the State Attorney's employment of Roberts. The only allegation of prejudice Bogle makes is that Roberts revealed that he and Paul Firmani had a good relationship with Bogle. Obviously, the relationship between the lawyers and their client was readily apparent from courtroom observations. Furthermore, the record shows that during the penalty phase Bogle wanted the court to know that he had been very cooperative with counsel. (T 1652) Moreover, even if this information was privileged, the revelation of same does not harm the defendant in any conceivable way. The trial court specifically found that Bogle was not prejudiced by the conversation. (T 948)

In light of the foregoing, the state urges this Court to affirm the trial court's order denying the request for a special prosecutor.

ISSUE II

WHETHER THE DEFENDANT WAS PRECLUDED FROM PRESENTING EVIDENCE TO REBUT THE AGGRAVATING CIRCUMSTANCE OF THE COMMISSION OF A SEXUAL BATTERY AGAINST THE VICTIM AT OR ABOUT THE TIME HE MURDERED HER.

Appellant contends that the trial court improperly restricted his presentation of evidence at his second penalty phase. He contends that a major portion of the prosecution's evidence dealt with the fact that scratches were supposedly present on Bogle's forehead after Margaret Torres disappeared that were not there earlier. Accordingly, he claims that the defense should have been allowed to present Mary Shrader's testimony that the injuries to Bogle's face were there after he was involved in a car accident several days prior to the Torres murder. He contends that this evidence not only went to the "mental mitigators" but, also that this evidence was critical to negate the aggravators of "heinous, atrocious or cruel" and "committed during a sexual battery." It is the state's position that the trial court properly excluded the admission of this testimony as the evidence did not support the mental mitigator or rebut the aggravating factors of "heinous, atrocious, or cruel" and "committed during a sexual battery," but, rather, constitutes an attempt to put the issue of lingering doubt before the jury.

During the second penalty phase, Mary Shrader testified that she had met the defendant through her husband. He worked with her husband and her husband would drive him back and forth to work. (T 1459) She testified that her husband loaned Brett and

was attempting to help Brett change his life. At the time her husband met Bogle he was using his check and pawning his tools to buy crack cocaine. (T 1460) She testified that his relationship with Katie Alphonso was on again, off again during this time period. (T 1465) On September 6, 1991, Bogle and her husband were involved in a car accident where a woman ran a red light and caused their car to hit a telephone pole. (T 1465) Bogle did not have his seatbelt on. He was thrown over the seat and hit the steering wheel. His head also went into the windshield. (T 1466) Shrader testified that she was in the emergency room hallway when the ambulance came into the hospital. She was allowed to go back and observe them working on Bogle. (T 1471) Shrader testified that she saw them taking glass particles out of his face and eyes and putting in stitches.

At that point, Bogle attempted to introduce the photos Det. Lingo had taken of the defendant after the crime. (T 1472) Defense counsel argued that since they did not know what theory the first jury returned its verdict of guilt upon, whether they thought it was premeditated or whether they thought it was done during the commission of a sexual battery, that this evidence went to the aggravating factor of 'during the commission of a felony.' (T 1473) He contended that this testimony was relevant to show that these injuries did not occur during the commission of the rape, but were a result of the car injuries. The court determined that Ms. Shrader was not in a position to testify that the scratches on the defendant's face reflected in photos taken

a number of days after the murder were the same injuries she might have seen on Mr. Bogle the previous week. (T 1474) Shrader was allowed to testify that the defendant had injuries to his face, three cracked ribs and a collapsed his lung. She also testified that he was in excruciating pain and crying out. (T 1475)

This Honorable Court in King v. State, 514 So.2d 354 (Fla. 1987), rejected King's claim that the trial court had erred in limiting the presentation of evidence to evidence going to aggravating and mitigating circumstances, thereby, precluding King from presenting evidence of lingering doubt. This Court stated:

> "King had been convicted, and his convictions had been affirmed on appeal; his guilt, therefore, was not an issue. The state, however, still needed to prove beyond a reasonable doubt the aggravating circumstances it felt supported a death sentence and, to this end, could present evidence rather than rely on the bare admission of the convictions." Id. at 358.

This Court has consistently held that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. Id. at 358. The introduction of mitigating evidence is limited to evidence relevant to the problem at hand, i.e., that it go to determining the appropriate punishment. The admission of evidence is within the discretion of the trial court and a reviewing court will not disturb the trial court's ruling unless an abuse of discretion is shown. Id. at 358 citing Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S.

1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); Hall v. State, 568 So. 2d 882, 884 (Fla. 1990).

The trial court in the instant case, simply precluded the admission of irrelevant and incompetent evidence which would merely serve to confuse the jury. The court in no way precluded Bogle from rebutting the evidence as presented by the state in support of this aggravating factor. Nor was he precluded from arguing that the injuries were the result of the car accident and not a sexual battery. The jury was instructed on the elements of sexual battery and informed that each aggravating factor must be established beyond a reasonable doubt. (T 1615, 1617). The court correctly precluded the nonexpert witness from expressing an opinion that she was not competent to make. Hall v. State, 568 So. 2d 882 (Fla. 1990). In fact, the record shows that with regard to this aggravating factor, counsel argued in closing:

> Next, the State has sought to show that the felony murder was committed during the course of a sexual battery. All I know is I wasn't there; the State of Florida wasn't there; you weren't there; but it's up to the State of Florida to prove it. Now, we don't know from the prior jury that found him guilty of First Degree Murder, whether they elected to find him guilty because of a premeditated homicide, or whether they believed in the alternative, as is shown in the indictment, that it was caused during the commission of a sexual battery. We don't know it, so the State of Florida still, even in the sentencing phase, has to prove it.
>
> And when I give these things that we've argued from the evidence, I'm not asking you just to follow the law. Do these things in the case convince you to have a reasonable doubt or don't they? Because if they do, you should

not find the aggravator. And if they don't, then find that aggravator and then give it what weight you see fit.

The pubic hair that was on the pants, the fact that it was removed naturally and not by force, which one would suspect would happen in the course of a sexual battery; the fact that that transfer of the pubic hair is more likely to have been transferred on a secondary basis rather than a primary basis, either through a washing machine or through the contact at the pubic hair between two people who had never met each other; who had never seen each other. They were together that night, and secondary transfers are possible; the fact that none of Brett Bogle's hair or fibers was found on the body of this woman that the State wants you to believe was raped by Brett Bogle, neither on her body nor around the scene; that the fact that the one hair that was found on her body after she died was that of a mixed race individual; that Brett Bogle was the person that raped her, but that, oh, he was only one of twelve-and-a-half percent of the population.

Now, true, twelve-and-a-half percent of the population, the white male population in Hillsborough County were not at Club 41 that night. But again, let's not forget who has to prove to you beyond and to the exclusion of all reasonable doubt that it was Brett Bogle. If they managed to get their DNA test right, they could have proved it. But I submit one in eight just doesn't cut beyond and to the exclusion of all reasonable doubt.

The fact that Phillip Alfonso did not see any blood on Brett Bogle, even though he described his clothes as dirty; the fact that he told us that although Brett Bogle said -- although he did not believe Brett Bogle was drinking that night, the fact that Brett Bogle had told him he had fallen down in the ditch and was drunk doesn't make sense that somebody who has just raped the relative of the Alfonsos would want them to give him a ride home that night.

> The fact that the sex act that the State has to prove to you as occurring at the time of the murder; the fact that the sexual act would have occurred up to three hours before -- and let's not forget hat Margaret Torres left by herself and was not seen for a couple of hours and we don't know exactly when she died; the fact that the injuries to the anal area could have been caused by consensual sex, because there was no lubrication, and the fact that the clothes were piled neatly, we don't know what happened that night.
>
> But the fact is, two situations could have happened: The clothes could have been ripped; could have been strewn everywhere, but they weren't. They were piled by the body. The fact that no gun was there, no knife was there at the scene, no gun or knife was found at the residence of Brett Bogle to indicate he had forced her to do this.

(R 1592 - 1595)

That defense counsel did not argue that the scratches were the result of the car accident was not because the evidence was excluded, but merely serves to establish the harmlessness of the alleged error. Under similar circumstances this Honorable Court has declined to find error. Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE BRETT BOGLE'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS WHICH DELETED THE WORDS "EXTREME" AND "SUBSTANTIAL" FROM THE STATUTORY MITIGATING FACTORS.

Appellant contends that the trial court erred in denying his requested modification to the standard jury instructions at penalty phase. Bogle had requested that the court strike the words "substantial" and "extreme" from the standard penalty phase jury instructions. (R 132 - 133) The trial court denied the motion and instead gave the standard jury instructions on mitigating circumstances. (R 1616) Appellant contends that the problem with the standard jury instructions given below is that they unduly limited the jury's consideration of the evidence Bogle presented as to the "mental mitigators" in violation of Cheshire v. State, 568 So. 2d 908 (Fla. 1990). In Cheshire this Honorable Court made it clear that in order for capital sentencing statutes to pass constitutional muster, "any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say." Id. at 912. It is the state's contention that the jury's consideration of mitigating circumstances was not unconstitutionally limited.

First, as appellant concedes, this Court in Stewart v. State, 558 So. 2d 416 (Fla. 1990), held that it was not error for the trial court to give the standard jury instruction over defense counsel's objection to the words "extreme" and "substantial." Thus, the trial court in the instant case did not err in denying the specially requested instruction.

As for appellant's contention that the instruction unconstitutionally limited the jury's consideration of relevant mitigating evidence, this Court in Foster v. State, 614 So. 2d 455 (Fla. 1992), rejected Foster's claim that the jury trial charge and prosecutor's closing argument limited the jury's consideration of mitigating evidence in violation of Cheshire v. State, supra. This Court found that where the jury was informed that it must consider any aspect of the defendant's character and background, or any other circumstance presented in mitigation and where there was no limitation on the mitigating factors which could be considered, that viewing the instructions as a whole there was no reasonable likelihood that the jury understood the instruction to preclude them from considering any relevant evidence. This Court further noted that in closing argument defense counsel discussed the mental health mitigation in detail. Foster's counsel argued that the evidence arose to a statutory level but, nevertheless, argued that Foster was clearly under emotional disturbance even though it did not meet the level required by statute.

The trial court below gave the following instructions with regard to mitigating circumstances:

> "Among the mitigating circumstances you may consider if established day the evidence are the following:
>
> 1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

2. The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

3. The age of the defendant at the time of the crime.

4. Any other aspect of the defendant's character, record or background, and any other circumstances of the offense."

(R 1616 - 1617)

During closing arguments, defense counsel argued to the jury that:

"Going on to the mitigators, I'll first list them and then try and give you some idea of why in the Defense opinion they are important; that Bogle is twenty-three; that the crime was committed while he was under the influence of extreme mental or emotional disturbance, and that there was a substantial impairment of the capacity of Brett Bogle to appreciate the criminality of the conduct or conform his conduct to the requirements of law.

And finally, as an additional catch-all which you can make any amount of mitigators that you wish, and give them any amount of weight that you wish, the defendant's character or any other circumstances about his life and background.

And don't forget, using an example, if you choose to believe the State of Florida and that the Defense has not proved substantial impairment of Brett Bogle's capacity to appreciate the criminality of his conduct, you can in turn say okay, I've not been satisfied of the statutory mitigator, but you can utilize that evidence as a non-statutory mitigator and put that in under his character and any other circumstances concerning the crime.

(R 1600 - 1601)

Furthermore, in the sentencing order, the trial court found the statutory mitigator of "capacity to conform conduct". (R 264) The trial court also considered the mitigating factor of extreme mental or emotional disturbance and found that it had not been established. The trial court then considered whether some emotional disturbance had been established and also rejected that finding. (R 264)

Accordingly, as the jury was given the proper standard instructions, after being told that it could consider any mental evidence as nonstatutory mitigation, and as the trial court considered the evidence, the state urges this Honorable Court to reject the instant claim.

Appellant also contends that the jury was improperly instructed that "If you are reasonably convinced that a mitigating circumstance exists, you may consider it established." This claim was rejected in Brown v. State, 565 So. 2d 304 (Fla. 1990). This Court approved the standard instruction and held that "instructions which establish no guidance for the consideration of mitigating circumstances would activate the admonition against a procedure that would 'not guide sentencing discretion but [would] totally unleash it.'" Id. at 308, citing, Lockett v. Ohio, 438 U. S. 586, 631 (1978) (Rehnquist, J., concurring in part and dissenting in part).

ISSUE IV

WHETHER THE COURT ERRED IN INSTRUCTING BRETT BOGLE'S JURY ON, AND IN FINDING THE EXISTENCE OF THE AGGRAVATING FACTORS.

A. Prior violent felony.

Appellant contends that the court below erred in instructing his jury and in finding the aggravating circumstance of prior violent felony. He contends that since the prior violent felony for which appellant was convicted was the earlier assault on the same victim that this conviction for the burglary simply gives no reliable insight into whether Bogle has a general propensity for violence. To support this proposition Bogle relies on this Court's decision in Wasco v. State, 505 So. 2d 1314 (Fla. 1987), wherein this Court held that the prior violent felony aggravating circumstance is not to be applied to additional, contemporaneous violent felonies perpetrated against the murder victim. Bogle concedes, however, that this Court in Pardo v. State, 563 So. 2d 77 (Fla. 1990), held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes. Nevertheless, he contends that the homicide of Margaret Torres clearly was a culmination of a long period of difficulties between Torres and Bogle that predated even the September 1st episode at the mobile home which resulted in Bogle's burglary conviction. He contends that the period between the incident of September 1 and the homicide must be considered, in effect, a continuing episode for purposes of this aggravating

circumstance. He further claims that although both Margaret Torres and Katie Alphonso were both victims to the burglary of September 1, Katie Alphonso was merely an incidental one and, therefore, doesn't qualify as a 'seperate victim.' It is the state's contention that this claim is without basis in fact or law.

First, the conviction for burglary clearly was not only a separate episode but, also, involved another victim. Thus, the finding clearly comports with this Court's holding in Pardo v. State, supra. See, also, Canaady v. State, 620 So. 2d 165 (Fla. 1993). Furthermore, even if the subsequent homicide was related to the prior jury conviction, there is no prohibition to using the conviction in support of the aggravating factor. In Wasco, supra, this Court recognized that under such circumstances the Court has upheld a finding of prior violent felony. In Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), this Court affirmed a finding of prior violent felony based on a conviction for attempted murder of a deputy while fleeing from the scene of a robbery murder. Similarly, in King v. State, 390 So. 2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1981), this Court agreed that the prior violent felony aggravating factor was substantiated where King had a conviction for attempted murder committed during the escape several hours after a robbery murder. Each of these attempted murder convictions constitutes a "culmination of a long period of difficulties" as alleged by appellant in the instant case.

Furthermore, appellant himself recognized the prior violent felony was not only twelve days prior to the murder in question, but it also included both Katie Alphonso and Margaret Torres' victims. As the trial court found in the sentencing order, "the evidence at trial was that the defendant broke into the house of Katie Alphonso and battered both Katie Alphonso and Margaret Torres." (R 262)

Accordingly, where the evidence shows that the prior violent felony conviction was for not only a separate incident but also involved another victim, the trial court properly found the aggravating factor. The facts in support of the finding only go to weight the court should afford the factor and not to the validity of the finding.

B. During a Sexual Battery

Appellant also contends that the trial court erred in instructing the jury on and finding the aggravating circumstance of committed during the course of a sexual battery. He contends that the evidence was insufficient to support the finding.

First, it is clearly not necessary that there be a conviction for sexual battery for the trial court to find the existence of this aggravating circumstance. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992).

Furthermore, a review of the trial court's order clearly supports a finding of this aggravating factor. The trial court found with regard to this factor:

"2. The capital felony was committed while the defendant was engaged in the commission of a sexual battery.

> Although the defendant was not charged with or convicted of sexual battery by the jury, the evidence at trial and penalty phase was that the victim, Margaret Torres, was found nude. She had semen in her vagina and trauma to her anus consistent with sexual activity. Dr. Vernard Adams, the medical examiner, testified the injuries to the anus were consistent with intercourse and the most reasonable possibility was that they were inflicted before death. The DNA extracted from the semen found in the victim was consistent, although proof was not positive, with the defendant's DNA. (12.5% of Caucasian males could have contributed the semen). Further, a pubic hair found on the defendant's pants, in the crotch area, was consistent with the pubic hair of the victim. Defendant was at the scene, exiting the bar immediately after the victim and later hat evening was seen by a witness in the immediate area of the murder his pants covered with dirt and mud, the crotch of his pants wet, and scratches on his forehead. This aggravating circumstance was proven beyond a reasonable doubt.

Appellant contends that despite the physical evidence which supports this finding, that Torres could have sustained these injuries through consensual sex, if the intercourse was rough and unlubricated. The suggestion that Margaret Torres and Brett Bogle had consensual sex in an alley within minutes of her leaving the bar and that this 'consensual' sex was so rough that

he tore her anus and then had vaginal sex, despite the continuing animosity that each bore for the other, is ludicrous. A trial court is not required to suspend all logic and reason when analyzing evidence. Clearly, when this evidence is considered in the light most favorable to the state, the evidence is sufficient to support the trial court's finding.

Appellant also contends that because Brett Bogle's jury was instructed on both felony murder and first degree premeditated murder, that the use of the sexual battery as an aggravating factor is unconstitutional. In support of this claim appellant relies on the United States Supreme Court's acceptance of certiorari in Tennessee v. Middlebrooks, 123 L.Ed.2d 466 (1993).

The United States Supreme Court has determined that certiorari was improvidently granted in Tennessee v. Middlebrooks, 114 S.Ct. 651 (December 13, 1993), and, therefore, the case is no longer pending. Accordingly, this Court should continue to reject this claim. See Bertolotti v. State, 134 So. 2d 386, 387 n. 3 (Fla. 1988); Clark v. State, 443 So. 2d 973, 978 (Fla. 1983).

C. Avoid arrest.

Appellant also contends that the trial court should not have instructed the jury on the aggravating circumstances of committed for the purpose of avoiding or preventing a lawful arrest. He contends, correctly, that the aggravating factor of 'avoiding arrest' is reserved for law enforcement officers or where the dominant or only motive for the killing was the elimination of a witness. Rogers v. State, 511 So. 2d 526 (Fla. 1987).

In the instant case, the trial court found:

> 3. The crime for which the defendant was to be sentenced was committed for the purpose of committing or avoiding a lawful arrest.
>
> > The defendant was charged and convicted of retaliation against a witness. The evidence shows that the defendant broke into the home of Katie Alphonso on September 1, 1991 and committed an assault and/or battery on Katie Alphonso and Margaret Torres. As Margaret Torres attempted to telephone the police, the defendant ripped the phone from the wall. He warned the victim that if she reported the crime she would not live to tell about it. Some days later, the defendant called Katie Alphonso and told her to tell the victim, Margaret Torres, to keep her mouth shut or it would be worse for her and later threatened that if she continued with the prosecution of the burglary she would not live to tell about it. The court finds that this aggravating circumstance has been proven beyond a reasonable doubt.

Clearly, the facts of this case do not fall within the normal circumstances where the victim is murdered during the commission of the crime so as to preclude identification and, therefore, arrest, for that crime. Nevertheless, in the instant case, where the defendant had not been arrested, and had made several threats against the victim if she pressed charges, the trial court properly found that this murder had been committed in order to avoid arrest on the burglary charge. Under similar facts, where the defendant had already been arrested, this court

has upheld the aggravating factor of disrupt or hinder law enforcement. Hodges v. State, 595 So. 2d 929 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1985); Koon v. State, 513 So. 2d 1253 (Fla. 1983); Lara v. State, 464 So. 2d 1173 (Fla. 1985).

Furthermore, although existing in the instant case, it is not necessary that intent be proved beyond evidence of an express statement of the defendant or an accomplice indicating their motives in avoiding arrest. Routley v. State, 440 So.2d 1257 (Fla. 1983). Nor is it required that this be the only motive for the murder. Bolender v. State, 422 So.2d 833 (Fla. 1982).

In the instant case, there is substantial evidence to support the finding. The state proved beyond a reasonable doubt that appellant had threatened to kill Torres if she pressed charges against him. The killing was done for the express purpose to avoid arrest. The state, therefore, submits proof of the requisite intent to avoid arrest and detection is very strong in this case. Accordingly, the trial court did not err in finding this aggravating factor.

D. Heinous, Atrocious or Cruel.

Appellant also contends that the trial court improperly found the aggravating factor of heinous, atrocious, or cruel. With regard to this aggravating factor, the trial court found:

> "4. The capital felony was especially heinous, atrocious, and cruel.

> The evidence at trial was that the defendant followed the victim out of the bar and attacked her in a secluded area beyond a closed Beverage Barn. He stripped her, raped her anally and vaginally and then bludgeoned her to death with a cement splash stone. He struck her a total of seven times with such force that her head was so are impressed into a hollow in the ground that the initial impression of the officers at the scene was that the head had been flattened to a considerable degree. The medical examiner testified that the victim was alive at the time of the infliction of most of the wounds but could not testify as to how long she survived, 'four breaths, several seconds, or a few minutes.' In his opinion, the last blows were those inflicted to the side of her head -- the blows which caused her death. The murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim, Margaret Torres. The defendant acted with complete indifference to the victim's suffering. This aggravating circumstance was proven beyond a reasonable doubt. (R 263)

This was a particularly heinous crime for which this aggravating factor was clearly established. Under similar circumstances, this Court has consistently upheld the finding of heinous, atrocious, or cruel. See Owen v. State, 596 So. 2d 987 (Fla. 1992) (victim raped and beaten); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) (victim beaten with tire changing tool, raped and drowned); Bowden v. State, 588 So. 2d (Fla. 1991) (victim beaten to death with a rebar); Gilliam v. State, 582 So. 2d 610 (Fla. 1991) (victim raped, beaten and strangled).

While the state adamantly contends that each of the foregoing aggravating circumstances was correctly found by the trial court, it clear that the striking of one or more aggravating circumstances can be deemed harmless. Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). It is the state's contention that the sentence in the instant case was properly found and urges this Honorable Court to affirm.

ISSUE V

WHETHER THE AGGRAVATING FACTOR OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL IS UNCONSTITUTIONALLY VAGUE AND WHETHER THIS AGGRAVATING FACTOR WAS SUBMITTED TO BOGLE'S JURY IN AN IMPROPER AND INADEQUATE INSTRUCTION.

Appellant contends that Florida Statute §921.141(5)(h) is unconstitutional and that the jury instruction given in the instant case was improper.

First, although Bogle objected to the constitutionality and applicability of the heinous, atrocious, or cruel aggravating factor, he did not object to the wording of the instruction. (R 47-56, 186, T 746-755) Therefore, the claim is waived as to the jury instruction. Ponticelli v. State, 18 Fla. Law Weekly S133 (Fla. March 4, 1993)

Furthermore, no error was committed. The jury was given the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in criminal cases. (T1615-16) This Court has consistently rejected claims that the statute or the new jury instruction are unconstitutionally vague.

> "Because of this court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious, or cruel against the vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976). Unlike the jury instruction found wanting in Espinosa v. Florida, U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d [illegible] (1992), the full instruction on heinous, atrocious and cruel now contained in the Florida Standard Jury Instruction in Criminal Cases, which is consistent with Proffitt was given in Preston's case.

Preston v. State, 607 So. 2d 404 (Fla. 1992). Accord, Stein v. State, 19 Fla. Law Weekly S 32 (Fla. January 13, 1994); Hall v. State, 614 So. 2d 473 (Fla. 1993).

The instruction given in the instant case and the statute are constitutional and, therefore, Bogle is not entitled to relief on this claim.

ISSUE VI

WHETHER APPELLANT'S DEATH SENTENCE IS PROPORTIONATE.

Appellant argues that none of the aggravating circumstances are valid and, therefore, in light of the strength of the mitigation, the death penalty is not warranted. It is the state's contention that the sentence was properly imposed and should be affirmed by this Court.

First, the finding of four aggravating factors was proper and well supported by the record. Furthermore, proportionality review is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). Under circumstances similar to the instant case, this Honorable Court has consistently upheld the imposition of the death penalty. Owen v. State, 596 So. 2d 987 (Fla. 1992) (victim raped and beaten); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) (victim beaten with tire changing tool, raped and drowned); Bowden v. State, 588 So. 2d 225 (Fla. 1991) (victim beaten to death with a rebar); Gilliam v. State, 582 So. 2d 610 (Fla. 1991) (victim raped, beaten and strangled); Occhicone v. State, 570 So. 2d 902 (Fla. 1990) (victims murdered because they interfered with defendant's relationship with daughter).

In Gilliam, supra, the victim was raped and beaten. The trial court found the aggravating circumstances of prior violent felony, HAC and committed in the commission of a sexual battery.

This was balanced against the Gilliam's abused childhood. Similarly, in Bowden, supra, this Court affirmed where the evidence shows that the victim was brutally beaten to death with a rebar and the trial court imposed death after finding HAC and prior violent felony balanced against Bowden's abused childhood.

In the instant case the jury recommended death by a vote of 10-2 and the trial court found the aggravating circumstances of prior violent felony, HAC, committed during the course of a sexual battery and committed for the purpose of preventing or avoiding arrest. This was, likewise balanced against Bogle's family background, as well as evidence of impaired capacity. Given the atrocity of the instant crime, the trial court properly imposed the sentence of death. This victim was brutally stripped, raped vaginally and anally and bludgeoned to death.

A review of the evidence and similar cases clearly show that this is the type of murder for which the death penalty was intended. Accordingly, the sentence should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments, facts, and citations of authority the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 13 day of April, 1994.

OF COUNSEL FOR APPELLEE.