IN THE SUPREME COURT OF FLORIDA

HORACE MELVIN POPE,

Appellant,

STATE OF FLORIDA,

Appellee.

Case No. 81,797
COURT APPOINTED

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

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE FACTS
Guilt Phase

Appellee did not specify areas of disagreement with Appellant's statement of the case and facts. Instead, Appellee merely recited substantially the same facts as in Appellant's brief but in a different order. Therefore, Appellant requests this court to strike Appellee's statement of the case and facts. See Rule 9.210(c), Florida Rules of Appellate Procedure.

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING EXCITED UTTERANCES AND DYING DECLARATIONS OF THE DECEASED

A. Excited Utterances

Appellee indicates that the facts in Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) are similar to the instant case. This is not correct. Garcia involved an execution-style killing of a husband and a wife in order to prevent the victims-witnesses from identifying the robbers. One execution occurred only after the first victim refused to give money to the robbers. An officer testified regarding what a third surviving victim, who was shot five times, told him when the officer responded to the crime and asked what happened. The case does not contain details regarding either the amount of time between the shootings and the declarant's statement or the specific physical condition of the declarant.

In comparison, in Mr. Pope's case the conflicting and confusing evidence regarding the timing of the stabbing is indicative of the state's failure to prove an absence of the opportunity for Alice to engage in reflective thought. In addition, Alice's actions, as detailed in Appellant's Initial Brief, show she engaged in reflective thought. Appellee incorrectly states that the timing of the declarant's statement is not important. See State v. Jano, 524 So. 2d 660, 662-663; Appellant's Initial Brief, p. 27-29.

Counsel for Appellant asked if he could make a "standing objection just one time" to hearsay statements in the form of "excited utterances" made to Wright. The court agreed to this procedure. (R1609) This objection was in addition to specific argument made throughout the hearing in which Wright's testimony was edited. In Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994), the defendant contended at a pretrial hearing that the evidence was inadmissible. There is no indication that Lindsey, unlike Mr. Pope, made a "standing objection" to the evidence or that the court accepted this procedure. This issue was properly preserved.

B. Dying Declaration

Alice's physical condition did not warrant a feeling that she was going to die and her actions show that she understood her condition. The cases cited by Appellee to support its position are distinguishable.

In Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989), the victims injuries and condition were much more serious than in the case at bar. In Price, the victim had been shot three times including in his heart. He was bleeding profusely and staggering. His face was reflecting terror, his coloring was white, he was wide-eyed, and he had a "death look on his face." The gunshot wound to the heart in Price would be categorized as a wound likely to cause death.

On the other hand, Alice walked 100 feet to seek help at Mr. Tice's home even though Mr. Tice said he had not "formally" met

Alice and other neighbors where 20 feet away. (R 1655) According to the Emergency Medical Technicians (EMT), Alice was coherent and able to carry on a conversation. She was simply described as distraught. (TR 227,229,236) At the pretrial hearing to determine admissibility of the hearsay statements. EMT Giger stated she never heard Alice ask questions about her condition, whether she thought she was severely injured, or whether she was going to die. (TR 233-234) EMT Giger and Witcher never told Alice their assessment of Alice's condition. (TR 223,233) EMT Witcher indicated that Alice stated many times that she was going to die when Alice was wheeled to the ambulance. However, EMT Giger never heard her make those comments. (TR 232-234) The contradictory statements made by the medical personnel and Alice's physical condition and actions did not warrant a finding that she thought her death was imminent.

In Teffeteller v. State, 439 So. 2d 840, 843 (Fla. 1993), medical doctors that attended to the declarant testified that "terminal patients on the 'final glide-path' are aware of their impending death" and the doctors believed the declarant knew he was dying. In contrast, in Mr. Popes case, there was uncontroverted evidence that Alice's wounds were the type that normally do not cause death. Appellee failed to discredit this important factor. Appellant correctly stated that Alice was initially unaware of her stab wounds. EMT Witcher heard Alice say she was stabbed when Alice's clothes were cut off; EMT Giger had to ask Alice about the stab wounds before Alice said, "Oh,

yeah, he stabbed me, too;" and Alice told Wright that she thought the origin of the blood was her head. (TR 230,R1658,1662-1663,1723-1724) Finally, the evidence clearly showed that Alice told Marsha that she could be charged with battery after the attack was completed when Marsha returned to the bathroom to check on Alice. (R1859) Appellee admitted this in her recitation of the facts. (See Appellee's answer Brief, p.4)

ISSUE II

THE COURT ERRED IN ADMITTING INFLAMMATORY PHOTOGRAPHS AND OTHER EVIDENCE

Appellee argues that extremely bloody photographs of the bathroom were relevant to show how the crime occurred. This conclusion is unsupported by the facts in this case. First, Alice's body was not in the pictures of the bathroom. Second, no evidence was presented to explain the location of the blood such as "blood-spatter" evidence. Finally, there was nothing unusual about the bathroom configuration and the jury could easily "visualize" the circumstances of the crime from the vivid testimony of numerous witnesses, including testimony about the enormous amounts of blood. Appellee's contention that the jury could determine whether Mr. Pope had the intent to kill by looking at the bloody bathroom is unreasonable. The amount of blood and the condition of the bathroom could not explain Mr. Pope's intentions.

The cases cited by Appellee are distinguishable because the pictures therein contained the victim's bodies in unique

locations or conditions. In Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985), the photographs depicted the victim's body which was bound and gagged. The pictures were relevant to show the location of the body in a field that the defendant led them to, the timing between the murder and the discovery of the body, and to corroborate the details of the defendant's confession. In Gore v. State, 475 So. 1205 (Fla.) cert. denied, 475 U.S. 1030 (1985), the body was found in the victim's mothers car with bound hands. This was relevant to prove the condition of the body, the effect of Gore's binding of the victim, and the location of the body. In State v. Wright, 265 So. 2d 361 (Fla. 1972), the picture was relevant to prove identification and to show wounds not in other pictures. Identification was not an issue in Mr. Pope's case. In Henninger v. State, 251 So. 2d 862 (Fla. 1971), the pictures of the body on stairs was relevant to prove identity, cause of death, and refute a claim of self defense.

Appellee incorrectly states that Appellant's Initial Brief states that all of the autopsy photographs were not relevant. In fact, appellant admitted that one photograph which depicted the stab wound and some bruises, was admissible. In Marshall v. State, 604 So. 2d 799, 804 (Fla. 1992), the court merely admitted one small polaroid to show a contusion which caused the victim's death. This is far less prejudicial than the eight color 8x10 photographs of Alice's bruises which did not cause her death but were admitted at Mr. Pope's trial. Furthermore, this court in Marshall cautioned trial judges to scrutinize this evidence for

prejudicial effect particularly when less graphic photographs could illustrate the same point. In Mr. Pope's case, admission of only Exhibit 5G would have allowed the state to show the jury the stab wounds and the bruises without the prejudicial effect of overkill.

The enlarged photos admitted in this case were highly prejudicial. The photographs may have been enlarged to accommodate the prosecutor's plan to hold the pictures up for the jury as they were published. Nevertheless, the enlarged photographs were sent back with the jury during deliberations in order to enable them to view the evidence. Finally the Appellant's Initial Brief describes Alice's blood soaked clothes as the "other evidence" which was erroneously admitted. (Appellant's Initial Brief, p. 37)

ISSUE III

THE COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES AND BY NOT GIVING ANY JURY INSTRUCTION ON MOTIVE

Appellee incorrectly states that Appellant argued that the evidence of the prior battery was inadmissible solely because it was dissimilar to the assault in this case. In addition to this argument, Appellant explained how the evidence was not relevant to prove motive and intent.

First, the state argued at trial that Mr. Pope's motive and intent was to kill Alice for pecuniary gain. None of the details of the battery proved advance planning to kill Alice for pecuniary gain or any other purpose. The Appellee argues that events in a relationship are probative of a party's state of mind

because relationships are defined by evolving "circumstances." Mr. Pope and Alice were lovers for almost five months prior to the assault that resulted in Alice's death. The battery had no causal connection, occurred several months before the assault, and did not prove any prior intent to hurt Alice for pecuniary gain. Therefore, it was not relevant to any material issue including Mr. Pope's intent.

Appellee's reliance on Layman v. State, 20 Fla. L. Weekly S141 (Fla. March 23, 1995) is misplaced. In Layman, unlike Mr. Pope's case, Layman confessed that he plotted various ways to kill the victim during his incarceration for a prior battery against victim and vandalism of the victim's car. Because of this specific statement, this court ruled that evidence of the prior incidents was relevant. The trial court and the state in Mr. Pope's case clearly agreed that there was no proof that Mr. Pope formed the specific intent to kill Alice during his incarceration for battery.

Appellee's statement that the evidence of the prior battery was necessary to present an orderly, intelligible case is ludicrous. No evidence was introduced to explain the events leading up to or the cause of the prior battery. Only one of the six witnesses had any personal knowledge regarding the actual battery: Wanda Pope saw Mr. Pope hit Alice. The evidence tended to show Mr. Pope routinely engaged in domestic violence, and thereby he had a bad character and a propensity to commit crimes.

Padilla v. State, 618 So. 2d 165 (Fla. 1993), Martin v.

State, 342 So. 2d 501 (Fla. 1977), and Tumulty v. State, 489 U.S. 150 (Fla. 4th DCA), rev. denied, 496 So. 2d 144 (Fla. 1986) all involved "inseparable crime evidence." In Martin, a weapon was found in defendant's boat which had been carrying marijuana. This Court stated that weapons are generally held to be "tools of the trade" and direct evidence of drug trafficking. A general statement, such as the one in Martin, can not be made regarding the connection between a battery and a subsequent murder. In Padilla, the shooting at an ex-girlfriend's apartment prior to but on the same day of the murder of the ex-girlfriend's son was relevant to prove the defendant's mental state and explain his actions on the day of the murder. However, in Padilla, there was evidence that the defendant obtained a gun from a friend immediately before shooting at the apartment; he obtained additional bullets from the friend after shooting at the apartment; and he later returned to kill the victim. Therefore, the timing of the events were intertwined.

In contrast, the battery did not explain Mr. Pope's actions or intent on the date of the assault that led to Alice's death. Appellee cannot claim that the evidence regarding the battery established the entire context of the assault on Alice five months later. Unlike the cases cited by Appellee, the battery and assault in Mr. Pope's case were not part of one prolonged criminal episode.

ISSUE IV

THE COURT ERRED IN FAILING TO GIVE DEFENSE COUNSEL'S REQUESTED INSTRUCTIONS ON THIRD DEGREE MURDER, ACCOMPLICES, AND OTHER LESSORS

A. Lesser of Third Degree Murder

Appellant relies upon the Initial Brief for this issue.

B. Lessors of Aggravated Battery and Battery

Appellant relies upon the Initial Brief for this issue.

C. Accomplice Instruction

Appellant's Initial Brief describes evidence which shows that Marsha may have been a willing participant in the assault against Alice. Clearly the jury did not believe all of Marsha's contradictory testimony since Mr. Pope was found not guilty of the kidnapping of Marsha. Appellee's reliance on Smith v. State, 344 So. 2d 915 (Fla. 1st DCA) cert. denied, 353 So. 2d 679 (Fla. 1977) and Robinson v. State, 574 So. 2d 108 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1992), is misplaced. In Smith, the defendant killed a man he found in defendant's home and with defendant's wife. The wife's involvement in the crime involved her participation in the "cover up" of the crime only. In Robinson the instruction was requested during the penalty phase of a trial, not regarding the issue of guilt. The court's refusal to give the instruction in Mr. Pope's case was error because there was evidence to support the defense claim that Marsha was an accomplice.

ISSUE V

THE PROSECUTORS'S COMMENTS ON MR. POPE'S RIGHT TO REMAIN SILENT WERE REVERSIBLE ERROR UNDER THE STATE AND FEDERAL CONSTITUTIONS

Appellant relies on the Initial Brief for this issue.

ISSUE VI

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT CHANGED THE ORDER OF THE VENIRE AND EXAMINED THE VERDICTS BEFORE THE JURY DELIBERATIONS WERE COMPLETED

Appellant relies on the Initial Brief for this issue.

ISSUE VII

THE TRIAL COURT ERRED BY NOT FINDING THAT THREE NONSTATUTORY MITIGATORS EXISTED AND BY REFUSING TO CONSIDER THE MITIGATORS IN DETERMINING THE SENTENCE

Appellant relies on the Initial Brief for this issue.

ISSUE VIII

THE SENTENCE OF DEATH IS DISPROPORTIONATE COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT

Appellee's argument disregards the facts that prove this case involves a domestic situation. There was uncontroverted evidence that Mr. Pope and Alice were lovers for almost five months prior to the assault that led to her death and that they constantly drank and bickered when they were together. (R1276-1277,1287,1813,1815) Both Alice and Mr. Pope drank heavily on the night of the assault. Marsha made many contradictory statements about the assault and the events leading up to it

including that she heard Mr. Pope and Alice fight and possibly engage in non-consensual sex.

The cases cited by Appellee are distinguishable. In Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, ___ U.S. ____ , 126 L. Ed. 2d 385 (1993), the prior felony was more egregious: a second degree murder committed after a brutal attack. Mr. Pope's prior crime involved a kidnapping and injury that required no treatment.[1] Although, Mr. Pope's case contains a second aggravating factor, his case contains more mitigating factors than in Duncan. The court in Duncan specifically found that Duncan was not acting under the influence of alcohol and the "statutory" mitigating factors of extreme mental and emotional distress and substantial impairment of the defendant's capacity to appreciate the criminality of his conduct were not proven. In contrast, the trial court's order in Mr. Pope's case gave some weight and great weight respectively to the above statutory mitigators. Nonstatutory mitigators of mental or emotional disturbance, intoxication at the time of the offense, and domestic violence were found to exist in Mr. Pope's case, as well. The nonstatutory mitigators in Duncan were not weightier than those in the case at bar.

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[1]Appellee states that the jury heard a mild version of Mr. Pope's prior conviction. However, Mr. Pope was never charged with rape of the kidnapping victim or of any other killings. During the penalty phase of a capital trial, the state cannot present evidence of criminal conduct for which the defendant was not arrested, tried, and convicted. This evidence is not relevant to the penalty issue in this case and the trial court correctly held this evidence was inadmissible. (R2521,2524,2528,2537)

In Freeman v. State, 563 So. 2d 73 (Fla. 1990), cert. denied, 111 S. Ct. 2910 (1991), the prior felony was for murder, armed robbery and burglary to a dwelling with an assault. These crimes were more egregious than Mr. Pope's and they were committed only three weeks before the murder which was the subject of the appeal. Mr. Pope's prior felony occurred fourteen years before the instant case. Furthermore, this court held in Freeman that no statutory mitigating factors existed and the nonstatutory mitigators were not compelling. This Court later called the mitigation weak when citing to Freeman in Clark v. State 613 So. 2d 412, 415 (Fla. 1992). In addition to the mitigation detailed by Appellant in this issue in its Initial Brief, there was additional mitigation evidence proffered to the court regarding Mr. Pope: he suffered from a mixed personality disorder with antisocial aspects; he acted under the statutory mitigator of extreme duress or substantial domination of another person; he had a dysfunctional family; he suffered from visual and auditory hallucinations in 1991; and he was unable to form appropriate relationships with male friends or heterosexual relationships due to prior homosexual rapes and a sexual experience at 12 years of age with a 24 year old woman. (R1377-1396)[2]

Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989) is distinguishable, as well. First, great weight

[2]The Court required defense counsel to proffer this evidence in camera because Mr. Pope refused to allow defense counsel to present mitigation evidence.

was given to the factor that Mr. Pope had a substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Little weight was given to this factor in Hudson. Mr. Pope's case contained more mitigating factors both quantitatively and qualitatively. Most importantly, Mr. Pope's case involved a killing of his lover whereas the court in Hudson stated the killing did not involve a domestic confrontation. Mr. Pope was not under a sentence at the time of this offense. Hudson was on community control for rape when he committed the armed burglary and killing. The knife used in the assault belonged to Marsha's family and was not brought to the house by Mr. Pope.

Appellant argued that the court incorrectly determined that three factors did not constitute mitigators and that the court did not have to consider them in its determination of the sentence. In Hudson, 538 So. 2d at 829, the court did not make a finding that evidence did not constitute a mitigating factor but instead gave little or no weight to factors not enumerated in the case.

The remaining cases cited by Appellee are distinguishable in that there was little or no mitigation found in those cases. In Clark, 613 So. 2d at 414, the court found there was no mitigation. In Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, __U.S. __, 120 L. Ed. 2d 881 (1992), the only mitigation was defendant's age and low I.Q. In Porter v. State, 564 So. 2d 1060, 1062, there were more aggravating circumstances including

that the homicide was committed in a "cold, calculated, and premeditated" manner and no mitigation.

The facts in Mr. Pope's case belie planning. (See Appellant's Initial Brief, p. 78) Appellee claims that Turner v. State, 530 So. 2d 45 (Fla. 1987), and Porter are analogous to Mr. Pope's case. However, the planning in both cases rose to the heightened level of "cold, calculated, and premeditated" and this statutory aggravating factor was weighed by the trial courts. The evidence in Mr. Pope's case did not support this statutory aggravating circumstance. In light of the aggravating and mitigating circumstances in Mr. Pope's case, the imposition of the death sentence was disproportionate and an arbitrary and capricious application of the capital punishment statute.

ISSUE IX

THE FLORIDA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL

Appellant relies on the Initial Brief for this issue.

CONCLUSION

For the foregoing reasons, this Court should reverse the convictions and remand for a new trial without the possibility of a death sentence. If the case is not remanded for a new trial, this Court should vacate Mr. Pope's death sentence and remand for the imposition of a life sentence. Alternatively, this Court should reverse and remand for a new penalty phase proceeding with a new jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Initial Brief of Appellant has been mailed to Office of the Attorney General, Carol M. Dittmar, 2002 N. Lois Ave., Suite 202, Tampa, FL, 33607, (813) 873-4730 on this 16 day of August, 1995.

Respectfully submitted,

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