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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82, 349

F.W. CUMMINGS-EL,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

LAW OFFICE OF
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NOTICE OF ADOPTION

The appellant would respectfully adopt and incorporate by inference the Introduction, Statement of the Case, Statement of the Facts, Points on Appeal, and Summary of the Argument, as stated in his initial brief.

ARGUMENT

I

THE TRIAL COURT ERRED IN STRIKING JURORS KOZAKOWSKI AND OSHINSKY FOR CAUSE ON THE BASIS THAT THEY COULD, UNDER NO CIRCUMSTANCES VOTE TO IMPOSE THE DEATH PENALTY.

The state first argues that the instant issue has not been preserved for review.

While counsel could have wished that trial counsel had more specifically preserved this point as to potential juror Kozakowski, appellant submits that trial counsel's comment "I thought he had descended from that position", (T. 121-2), a response opposed to the prosecution's "for cause" attempts to have jurors stricken, was sufficient to show an objection to Juror Kozakowski's removal and thus preserve it for appellate review. When potential juror Oshinsky was excused, counsel stated:

Here's a man who's a cardiologist. Here's a man who is a attorney. Both of these people again indicated he came down from holding the state to a higher burden of proof, but wants to be sure in the death penalty phase. I don't think he's met threshold to be excused.

(T. 371-2)

The appellant respectfully submits that the excusal of these two potential jurors was properly preserved for review.

Even if this issue were not preserved, Florida Appellate Courts may take notice of jurisdictional or fundamental error apparent in the Record on Appeal whether or not it has been the subject of an objection in the lower court. See, Pittman v. Roberts, 122 So.2d 333 (Fla. 2d DCA 1960). A fundamental error exists if its correction can be deemed essential to the object and purpose of the proper administration of justice. See, Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108 (Fla. 1st DCA 1978). This is a capital case. The death penalty was sought and obtained. If a juror whose vote was one-twelfth (1/12) of that determination and whose input in jury deliberations may have been appreciably greater than his single vote was improperly excused for cause, appellant submits that there exists error which is essential to the object and purpose of the administration of justice.

Potential juror Kozakowski stated that he leaned towards life imprisonment. As we operate under the presumption that the death penalty should be reserved for the most extreme of first degree murders, "the worst of the worst", his statement tracks the law. The death penalty should be only for the "worst of the worst". Without knowing any facts, and having the death penalty issue thrust upon them suddenly, with little or no time for reflection, jurors would have to lean towards life imprisonment as the death penalty is only for the "worst of the worst" and the defendant was not shown to have fallen into the extremity of that outcast group.

Mr. Kozakowski articulated situations in which he could vote for the death penalty (T. 72-73) indicating that he was mentally open to following the court's instructions in the death phase. Mr. Kozakowski never stated that he would "vote against death regardless of the facts presented or instructions given". He never expressed any reservations as to finding guilt or innocence knowing that a finding of guilt would necessitate a penalty phase proceeding. The appellant submits that potential juror Kozakowski was improperly excused for cause.

Potential juror Oshinsky could separate his belief against the death penalty from determining whether someone was guilty or not guilty (T. 321-322). With great difficulty he could vote for the death penalty (T. 321-322). Just because Mr. Oshinsky would, too, vote death with "great difficulty" does not automatically exclude him as a juror. He, too, could find guilt or innocence. He, too, could vote to apply the death penalty with "great difficulty" (for the "worst of the worst"). The appellant submits that nothing expressed by Mr. Oshinsky showed that his views would prevent or substantial impair the performance of his duty under oath and in accordance with the judge's instructions. See, Wainwright v. Witt, 369 U.S. 412 (1985).

In this case, on these facts, the appellant submits that it was error to excuse potential jurors Kozakowski and Oshinsky for "cause".

II

THE TRIAL COURT REVERSIBLY ERRED BY COMMENTING TO THE JURY ON THE DEFENDANT'S BURDEN OF PROOF AND UPON HIS RIGHT TO REMAIN SILENT.

As argued in Point I, an appellant court may consider fundamental error in the absence of an objection. In a capital case, a comment by the trial court upon a defendant's remaining silent is, appellant submits, fundamental error:

It's possible that the Defense does not utter a word through the whole trial. Although it wouldn't happen. It shouldn't happen.

(T. 247-248)

This defendant/appellant did not testify either in the guilt or penalty phase. The appellant submits that the trial court's comment was fairly susceptible to being interpreted by the jury as a comment upon the appellant's failure to testify ("wouldn't happen,", "shouldn't happen").

This defendant was condemned to death, essentially, by an 8-4 jury vote. There exists the possibility that jurors' death penalty votes may have been swayed by the trial court's comments and the appellant's subsequent failure to testify. After all, the trial judge is the one supposedly neutral figure to whom the jury can look for instruction. When the trial judge states that something "wouldn't happen", "shouldn't happen", but then does happen, the appellant submits that there exists the probability that the jury took into consideration both the judge's comments and the appellant's apparent lack of action in relation to them when making

its death penalty recommendation.

If a defendant is to be executed by the state, questions such as those posed by the instant improper comment and the jury's reaction to it should not exist.

Pursuant to the facts of this case, and the authorities cited in appellant's initial brief, appellant submits that his Convictions and Sentences must be Reversed and this cause remanded for appropriate proceedings.

IV

THE TRIAL COURT ERRED N FINDING THAT THE AGGRAVATING FACTOR OF "HEINOUS, ATROCIOUS AND CRUEL" APPLIED TO THE FACT OF THIS CASE.

This Court has found that "especially heinous, atrocious or cruel should be applied to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The testimony was that appellant stabbed Kathy Good quietly, quickly and suddenly while she was sleeping. The act of the defendant, the stabbing, was quickly over. There was no evidence of an intent to inflict a high degree of pain or of an intent to enjoy her suffering. The appellant was not shown to have lay in wait or stalked Ms. Good. There was only one injury pattern (5 stabbings). There were no other trauma or abrasions indicative of other elongated injuries or suffering. The appellant made no statement or by no other means revealed an intent to cause Ms. Good torturous suffering.

The Record reveals a perpetrator who suffered from an

obsession regarding Ms. Good. He went to the house to stab her, did so and fled without stabbing anyone else though he had the means to do so or, in anyway, prolonging the incident. The instant crime happened too quickly and with no substantial suggestion that the crime was intended to inflect a high degree of pain or to otherwise torture Ms. Good. The facts of this crime do not stand it apart from the norm of capital felonies or did it evince extraordinary cruelty.

As the jury recommendation was 8 to 4, this factor could have made the difference (a life recommendation) in the jury's recommendation. The defendant must be Resentenced.

V

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF "COLD, CALCULATING AND PREMEDITATED".

The appellant and Ms. Good had once lived together, but had parted company. The appellant could not bear the fact that Ms. Good did not want him.

In this case, the evidence shows that appellant went into a house full of sleeping people, into Ms. Good's room with persons sleeping in and around her bed, stabbed Ms. Good, and ran out of the house dropping the murder weapon as he ran. This was not a carefully planned crime!

There is no evidence that appellant had previously threatened Ms. Good with a knife. There is no statement of the appellant's or other evidence to show <u>when</u> he formed the scheme to <u>stab</u> her.

In its brief, the state argues "there was no evidence adduced to any connection between a familial situation and the defendant's state of mind". To the contrary, the breakdown of the familial situation between the appellant and Ms. Good resulted in the appellant's obsession which led to the fatal incident. The appellant didn't harm anyone else when he confronted Ms. Good before the incident and stabbed no one else, though he was armed, at Ms. Good's house. Appellant was obsessed with Ms. Good and their breakup, an obsession that both clouded rational and reasonable thought, and, prevented the formation of such heightened premeditation as would validate a finding this murder was cold, calculated or premeditated. There is no evidence that appellant contemplated stabbing Ms. Good well in advance of the incident. The appellant did not misrepresent himself to gain access the Good home nor did he leave it in a calm and deliberate manner. This was not an execution or contract murder. This was the act of a man obsessed/under extreme emotional distress.

On this record, the appellant submits that the trial court erred in finding the aggravating factor of "cold, calculated and premeditated". As the jury recommendation was 8 to 4, this factor could have made the difference in the jury's recommendation. The appellant must be resentenced.

VI

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY.

The appellant submits that because death is a unique

punishment it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases.

This was a killing that arose from a "domestic" relationship. The killing was not heinous, atrocious or cruel. The killing was not cold, calculating or premeditated. The appellant, obsessed by the failure of a domestic relationship with Ms. Good, broke into Ms. Good's house, and, while she was sleeping amidst several witnesses (who testified against appellant), quickly stabbed Ms. Good, then fled pursued by occupants of the house, and dropping the murder weapon as he fled. The appellant was identified by people who saw him as he fled. This was not a sophisticated or well-planned crime. There is no evidence to show a carefully planned scheme to stab Ms. Good. Certainly, the several flaws in the incident itself show poor planning. There is no evidence to dispute that appellant, on the night of the incident, on the spur-of-the moment, decided suddenly to stab Ms. Good as she lay sleeping and did so because of his mental obsession with the demise of their relationship.

The appellant had no previous convictions for murder or attempted murder. He did not stab anyone other than the object of his obsession.

The burglary cited as an aggravating circumstance (P. 54 of state's brief) was done under the same obsession as the stabbing. It was done so that the stabbing could occur. No property was

taken. No one else was stabbed. The entering of the house was solely to stab Ms. Good and was a product of the same obsession, arising from a domestic situation, which resulted in Ms. Good's stabbing.

Appellant submits that the death penalty, being the ultimate penalty, should be reserved solely for the "worst of the worst". He also submits that when the facts of this case are compared to other first degree murders, it is readily apparent that death is not the appropriate penalty.

The appellant submits that his death penalty must be Vacated and he must be sentenced to Life Imprisonment with a minimum mandatory 25 years imprisonment.

CONCLUSION

Based on the above facts, arguments and authorities, the appellant submits that his conviction and sentences must be Reversed and this case remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 401 N.W. 2nd Avenue, Miami, Florida 33128, on this 2 day of May, 1995.

Respectfully submitted,

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