IN THE SUPREME COURT OF FLORIDA

RONNIE FERRELL, :

Appellant, :

vs. : CASE NO.: 83076

THE STATE OF FLORIDA, :

Appellee. :

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

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REPLY BRIEF OF APPELLANT

TERESA J. SOPP
ATTORNEY AT LAW
Liberty Center
7077 Bonneval Road, Suite 200
Jacksonville, Florida 32216-6062
Florida Bar No. 265934

(904) 296-2640

Attorney for Appellant

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ISSUE I.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO BIBLICAL ORIGINS OF THE COMMANDMENT "THOU SHALT NOT KILL"

Ferrell asserts that the trial judge's comments regarding biblical interpretations of the death penalty constitute fundamental error. Precisely because this case involved the imposition of the death penalty, the trial court's comments regarding his interpretation of biblical dictates which might bar imposition of the death penalty could certainly have misled the jurors, convincing them to abandon personal philosophy in order to more freely impose the death penalty.

The cases upon which appellee relies in support of its contention that Ferrell has waived the issue on appeal are not applicable, because they do not deal with issues of fundamental error. The comments of Judge Olliff regarding the interpretation of the commandment "Thou shalt not kill" constituted such fundamental error as to merit review even without objection at trial. Because the prosecution was seeking the death penalty, it was utterly improper for the trial judge to instruct the jury as to his personal interpretation of biblical phrases. The trial court's comments went right to the basic issue of the case--whether the death penalty could or should be imposed. This inappropriate comment goes directly to the foundation of the case and therefore constitutes fundamental error. It cannot be said that statements such as Judge Olliff's--backed by the authority and power of the judicial robe--did not affect the jurors who sat in the case,

particularly in the penalty phase.

This court has held that fundamental error is "error which goes to the foundation of the case . . . ." Hopkins v. State, 237 So.2d 134 (Fla. 1970). In State v. Johnson, 616 So.2d 1 (Fla. 1993), this court stated

> [F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.

616 So.2d at 3, citing D'Oleo-Valdez v. State, 531 So.2d 1347 (Fla. 1988) and Ray v. State, 403 So.2d 956 (Fla. 1981).

It has been said that "[t]he single most dominant factor in the administration of a trial is the conduct of the judge; the manner in which [the judge] exercises control over such proceedings is reflected through his remarks and comments." Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975). Moreover, it has long been held that the trial judge is obliged to refrain from any comment in the presence of the jury that is capable of conveying to the jury any intimation of what view [the judge] takes of the case. See, e.g., Lister v. State, 226 So.2d 238 (Fla. 4th DCA 1969); Kellum v. State, 104 So.2d 99 (Fla. 3d DCA 1958). The right to trial by jury is so fundamental that when comments of the trial judge erroneously "bend" legal concepts to fit the facts of a particular case, the result constitutes reversible error. Lester v. State, 458 So.2d 1194 (Fla. 1st DCA 1984).

The juror who exhibited concerns about biblical philosophy was actually seated on the jury; clearly the judge's improper comments

could have and would have been likely to affect her. It cannot be said that the trial court's comments were not fundamental error. Because the comments constituted fundamental error, this court should reverse this cause and remand for a new trial.

ISSUE II.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A COLLATERAL CRIME

The state asserts that Ferrell's trial counsel made no objection to the admission of collateral crime evidence. (Brief of appellee at 17-20). The record exhibits the contrary--Ferrell's attorney voiced his objection to the admission of such evidence, and his objection is sufficient to preserve the record for appeal. (T-428-29). Ferrell relies on his argument in his initial brief.

ISSUE III.

THE TRIAL COURT ERRED IN ADMITTING A PURPORTED STATEMENT OF GINO MAYHEW TO LYNWOOD SMITH AS AN EXCITED UTTERANCE

Ferrell relies on his argument set forth in his initial brief as to this issue.

ISSUE IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE FIRST-DEGREE MURDER

Ferrell relies on his argument set forth in his initial brief as to this issue.

ISSUE V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF ARMED ROBBERY

Ferrell relies on his argument set forth in his initial brief as to the question whether there was sufficient evidence to sustain a conviction for robbery.

ISSUE VI.

THE TRIAL COURT ERRED IN SENTENCING APPELLANT AS A HABITUAL FELONY OFFENDER

Ferrell relies on the argument set forth in his initial brief as to this issue.

ISSUE VII.

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED MANNER"

Ferrell relies on his argument in his initial brief as to this issue, but supplements that argument with the case Wuornos v. State, 20 F.L.W. 5481 (Fla. Sept. 21, 1995),[1] for the proposition that the state has failed to establish the aggravating factor "cold, calculated and premeditated." In Wuornos, this court held the trial court had improperly relied on collateral crimes evidence which had established Wuornos' propensity to commit the murder. That is precisely what occurred in this case--the trial court relied on improper collateral crimes evidence--evidence of the purported robbery of Mayhew--to establish that Ferrell had participated in a homicide which had been "cold, calculated and premeditated." Additionally, in Wuornos, this court held Miss Wuornos' confession to be insufficient proof of the existence of the "cold, calculated and premeditated factor." In this case, Ferrell's purported "confession" to jailhouse informant Williams was simply not sufficient to establish this aggravating factor. This court should find the aggravating factor "cold, calculated and premeditated" does not exist given the facts of this case, and should remand for resentencing.

Moreover, this court recently rejected the "cold, calculated and premeditated" aggravator where the defendant had "cased" the

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[1] Wuornos II

victim and her apartment complex before deciding to burglarize, rob and sexually assault her. In Barwick v. State, 20 F.L.W. S 405 (Fla. July 20, 1995), "careful plan" or "prearranged design to kill the victim" is necessary before the CCP aggravator can be applied. 20 F.L.W. 5405 at 5409. Simply because a plan exists to commit another felony it cannot be said a pre-arranged design to kill existed. Under the rule of this court as set forth in Wuornos and Barwick, insufficient evidence exists to support the aggravating factor "cold, calculated and premeditated;" the trial court's finding that this aggravating factor existed is error and the imposition of the death penalty in this cause must be reversed.

ISSUE VIII.

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING CIRCUMSTANCE OF "CRIME COMMITTED FOR FINANCIAL GAIN"

The cases upon which the state relies in opposition to the claim are distinguishable and should not be relied upon by this court. Thompson v. State, 553 So.2d 153 (Fla. 1989), differs factually from the case at hand. In Thompson, an eyewitness (and co-defendant to the murder) testified firsthand about actual statements made to the victim before his death. Moreover, this court noted, "it was clear the purpose of the beatings was to prevail upon [the victim] to divulge where the money was located." 553 So.2d at 156. There is no such evidence in the instant case, and the trial court erred in determining this crime was committed for pecuniary gain. In fact, if the testimony of "jail house informant" Williams is to be believed, Ferrell's co-defendants had put out a "hit" on Mayhew so he [Mayhew] couldn't get them first. (T-670-71). Williams testified Mayhew had already put out the first "hit" on the co-defendants and that "hit" is "slang terms that we use to have somebody killed . . . ." (T-671). There was no testimony Ferrell was involved in this.

Wuornos v. State, 633 So.2d 1012 (Fla. 1994),[2] involved three murders where cash and personal articles were missing and to which the defendant gave detailed confessions. Clearly, Wuornos I is distinguishable from the instant case by the quantifiable amount of

[2]Wuornos I.

evidence pointing to actual monetary gain; Wuornos I should not be relied on by this court.

Larkins v. State, 655 So.2d 95 (Fla. 1995), can be even more easily distinguished from Ferrell: in Larkins, the defendant robbed a convenience store clerk and a customer in the store, demanding cash from both. Two eyewitnesses testified they actually SAW Larkins demand cash. No evidence of the sort exists in the present case, and the aggravating factor "pecuniary gain" simply cannot be sustained by the evidence presented. Similarly in Henry v. State, 613 So.2d 429 (Fla. 1992), an eyewitness testified that money had actually been taken in the robbery. Henry is thus distinguishable from the instant case.

Harmon v. State, 527 So.2d 182 (Fla. 1988), is similarly distinguishable because an eyewitness to the murder testified that the defendant had taken the victims's wallet, removed the cash and disposed of the wallet. 527 So.2d at 188. Again, this court should disregard Harmon because of factual dissimilarities.

All of the cases upon which the state relies to establish the aggravating factor "committed for pecuniary gain" are distinguishable from this case by the weight and credibility of the evidence supporting the factor. Clearly, when compared to Thompson, Wuornos I, Larkins, Henry, and Harmon, Ferrell was not involved in a homicide for pecuniary gain. This finding is not sustained by the evidence and this court should reverse and remand for the imposition of a life sentence.

ISSUE IX.

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS OR CRUEL"

The state speculates as to theories regarding the order of gunshot wounds in this case although no absolute evidence at trial was offered which could sustain these theories. The state asserts that Mayhew was shot at least twice while he was "alive and conscious," and fallaciously concludes that the evidence shows that Mayhew had "[o]bviously . . . looked back in response to some stimulus . . . . " (Brief of appellee at 41). The state also asserts the wound in Mayhew's finger was "surely" inflicted by the same bullet that bounced off his finger, even when the state's own expert could only testify that this was "probable." (T-529).

There was no conclusive testimony on the exact manner of Mayhew's death, or on the order of the gunshot wounds. In fact, the medical examiner testified that he had no way of knowing in which order the wounds had been inflicted. (T-513). The state's assertion that it is logical to infer that Mayhew experienced a "foreknowledge of death, extreme anxiety and fear" (Brief of appellee at 42), is wholly unfounded and should be disregarded by this court.

This case should be governed by this court's ruling in Kearse v. State, 20 F.L.W. S 300 (Fla. June 22, 1995), *modified on rehearing* at 20 F.L.W. S 565 (Fla. Nov. 9, 1995). In Kearse, this court held that a murder is "heinous, atrocious and cruel" if it

exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another." 20 F.L.W. at S 303, citing Cheshire v. State, 568 So.2nd 908 (Fla. 1990). The Kearse court stated "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is ***as a matter of law not heinous, atrocious, or cruel.***" 20 F.L.W. at S 303 (citations omitted). Clearly, the death of Gino Mayhew was ordinary in the sense that it was not in any way set apart from the norm of premeditated murders. No evidence whatsoever exhibited any desire on the part of Ferrell to inflict a high degree of pain, and no evidence established that Ferrell had an "utter indifference to" or enjoyed any suffering of Mayhew.

In Kearse, testimony established that the defendant had shot the victim (a police officer who had stopped him for a traffic violation) ***thirteen*** times. Proof of numerous gunshot injuries simply does not establish the existence beyond a reasonable doubt of the "heinous, atrocious and cruel" aggravating factor.

The record fails to show any such facts; therefore this aggravating factor is unsustained and cannot be the basis for the imposition of the death penalty. This cause must be reversed and remanded for the imposition of a life sentence.

ISSUE X.

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED"

Ferrell relies on the argument set forth in his initial brief as to this issue.

ISSUE XI.

THE TRIAL COURT IMPERMISSIBLY DOUBLED THE STATUTORY AGGRAVATORS OF "KIDNAPPING" AND "PECUNIARY GAIN"

Ferrell relies on the argument set forth in his initial brief as to this issue, but has requested by separate motion to be allowed to file a supplemental brief on the question of proportionality of the death sentence which the state raises at pages 49 and 50 of its brief.

ISSUE XII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR SPECIAL VERDICTS

Ferrell relies on the argument set forth in his initial brief as to this issue.

CONCLUSION

Because the trial court erred in making improper comments to the potential jurors, and in admitting impermissible evidence at the trial of this cause, appellant's convictions should be reversed, and this cause remanded for a new trial. Second, the trial court erred in denying appellant's motion for judgment of acquittal; because the state failed to present a prima facie case as to the charge of first-degree murder and as to the charge of kidnapping, the motion should have been granted, and appellant discharged as to these two counts. Because the trial court erred in finding that statutory aggravating factors had been proved beyond a reasonable doubt, this cause should be remanded for the imposition of a life sentence on the first-degree murder charge, or remanded for a new sentencing hearing before a new jury. Finally, because the trial court impermissibly doubled aggravating factors and erred in both jury instructions and in verdict forms, appellant's convictions must be reversed and this cause remanded for a new trial and penalty phase hearing.

Respectfully submitted,

TERESA J. SOPP
Attorney at Law

Teresa J. Sopp
Attorney for Appellant
Liberty Center
7077 Bonneval Road, Suite 200
Jacksonville, FL 32216-6062
(904) 296-2640
Florida Bar No.: 265934

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, the Capitol, Tallahassee, Florida 32301; and to George Bateh, Office of the State Attorney, Duval County Courthouse, Jacksonville, FL, 32202, by regular United States Mail this 29th day of November, 1995.

Teresa J. Sopp
Attorney for Appellant