IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 83,598
Case No. 83,557

CONSOLIDATED

GREGORY STEPHEN BIAS,

Appellee.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT STATE OF FLORIDA

ANSWER BRIEF OF PETITIONER/RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Since the diminished capacity defense is not available to defendants in Florida, evidence of a mental impairment in the absence of an insanity plea is inadmissible. Accordingly, a strict reading of Chestnut would preclude the evidence Respondent seeks to offer in the instant case.

ARGUMENT

ISSUE II

WHETHER THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGES OF FIRST DEGREE MURDER AND ROBBERY.

Appellant was tried and found guilty of first degree murder and robbery. Appellant argues that the trial Court erred in denying his motion for judgment of acquittal because Appellant alleges that the evidence did not show that the murder was premeditated and that he did not have the intent to rob his mother. The State strongly disagrees.

In Lynch v. State, 293 So. 2d 44 (Fla. 1974) the Florida Supreme Court sated: "The court should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the Law."...

Further, "it is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State." Sate v. Law, 559 So. 2d 187, 189 (Fla. 1989).

In Bedford v. State, 589 So. 2d 245, 250 (Fla. 1991) the Florida Supreme Court reviewed a first degree murder conviction and sentence. The Court held that "the question of whether the evidence proves premeditation to the exclusion of all other

reasonable inferences is a question of fact for the jury, whose verdict will not be reversed on appeal where there is substantial competent evidence to support it." The State asserts that there was substantial competent evidence that the murder was premeditated.

"Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accursed to be conscious of the nature of the act he is about to commit and the probable result of the act." Asay v. State, 580 So. 2d 610, 612 (Fla. 1991). Premeditation can be shown by circumstantial evidence. Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987).

The facts in the instant case in the light most favorable to the State show that Appellant intended to murder and rob his mother and his alleged intoxication did not prevent his ability to form the requisite intent. Appellant inflicted at lest six blows to his mother's head. (R. 349-351). Appellant hit his mother with enough force to end her life. Appellant pursued his mother and hit her as she was moving away from him as evidenced by her blood on the walls, floors and on the furniture of every room in the house. (R. 269-273, 309-326). After the final blow to his mother's head he left her in her bedroom face down on the floor. He then took her car keys and took all the money that was in her purse. (R. 329, 501-504). Appellant then left the apartment and rode down the elevator to the lobby. The security guard testified that Appellant seemed calm, cool, and collected

as he walked through the lobby without signing out which he was required to do. (R. 233). She testified that Appellant was not swaying and did not appear in a state of disarray. (R. 233). Appellant then took his mother's car and left the scene. (R. 501-504).

ISSUE III

WHETHER THE TRIAL COURT PROPERLY SENTENCED APPELLANT AS AN HABITUAL FELONY OFFENDER.

Appellant argues that this written sentence for the murder conviction classified him as an habitual felony offender. The State agrees with Appellant that a capital offense is not subject to habitual offender classification. McClain v. state, 612 So. 2d 664 (Fla. 2d DCA 1993). Accordingly the record should be corrected to delete Appellant's classification as an habitual offender pursuant to Count II, first degree murder. (R. 184).

The State will next address Appellant's habitualization on the conviction of the robbery charge. The trial Court stated the following:

> THE COURT: January 15th 1990. As to the robbery charge, I am going to treat you as an habitual felony offender The State has noticed you as an habitual felony offender. I have the notice. I have reviewed the PSI. I have submitted into evidence State's Exhibit Number 1, which is a copy of a number of certified copies of convictions. And for the purposes of the record, I'll read some of them into the record, perhaps not all. I have 85-126, which is a conviction dated November the 18th, and that, I believe, was for burglary of a dwelling.
>
> I have also submitted -- and you'll have to bear with me because these are out of county convictions. I'm looking, is that one you are relying on as being within the five year period, Miss Cox?
>
> MS. COX: Yes, your Honor, the '85 one and also one from Horry County, South Carolina, which has a letter on the front of it.

THE COURT: Oh, I have it here. Okay. I also have a certified copy of a judgment and conviction this was out of South Carolina. I didn't realize that's what this was, which is dated June the 30th 1990. Would that be correct?

MS. COX: That's correct.

THE COURT For breaking into a motor vehicle and grand larceny. There are also other certified copies of judgments and convictions which are made a part of the State's Exhibit Number 1 which I will not read into the record, however, I do find that he does qualify to be treated as an habitual felony offender having had at least one or two prior felony convictions and at least one of them was within five years of the date of this offense.

I will also find that I have had no -- no evidence that any have been set aside pursuant to any post-conviction relief motions or any pardons. And as I've said, I've reviewed the fact that he was noticed on September 11th, 1992, with the State's intent to treat him as an habitual felony offender.

I'm going to sentence you to a period of thirty years in the Florida State Prison to run consecutive to the life sentence.

(R. 764-765).

The State presented four copies of certified convictions which were presented into evidence as composite exhibit number one without objection by defense counsel.

MS. COX: Well, Your Honor, the state has filed a notice of habitual and it's been served on defense counsel and the defendant. I have certified copies of his convictions which I will present to the Court. They have previously been shown to Mr. Alldredge and I believe that there is no dispute between the state and the defense that these are, in fact, copies of the convictions of MR. Bias And for the record, I am putting into

evidence certified copies of case number 83-654 which is a conviction for aggravated battery in Palm Beach County; 91-2623, which is a conviction for grand theft from Palm Beach County, both Palm Beach County, Florida : 85-216, which is a conviction for burglary of a dwelling from Lee County, Florida; and case number 89-GS261113, which is a conviction of burglary of a structure and I guess just burglary of a structure from Horry County, South Carolina, H O R R Y.

THE COURT: And do you have any objections if we mark those as a composite exhibit?

MR. ALLDREDGE: No, Your Honor.

THE COURT: All right, Composite Exhibit 1.

(R. 726-727).

In State v. Johnson, 616 So. 2d 1 (Fla. 1993) the Florida Supreme Court held that the Habitual Offender Statute contained in Chapter 89-280 violated the single subject rule of Article Three, Section Six of the Florida Constitution. The Court held that the decision would require the resentencing of individuals sentenced as habitual felony offenders under this Section and whose offenses were committed before May 2, 1991, and only to those defendants affected by the amendments to this Section.

In Baxter v. State, 616 So. 2d 47 (Fla. 1993), the defendant's habitual felony offender sentence was based on a prior out-of-state felony conviction. The Court held that the habitual offender sentence was void because Chapter 89-280 was the only authority for considering prior out-of-state felony convictions as the basis for sentencing as an habitual felony offender.

The State asserts that the three in-state convictions, case numbers 93-654, 81-2623, and 85-216 - admitted into evidence without objection by the State Attorney and referred to by the trial court - properly qualified Appellant as an habitual felony offender. However, if this Court finds that the trial court used the South Carolina conviction as one of the two requisite felony convictions, the State asks this Court to remand this cause to the trial court to determine and read into the record the in-state convictions which qualify Appellant as an habitual felony offender. Kiely v. State, 18 Fla. Law Weekly D2163 [opinion filed October 1, 1993].

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

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. mail to STEVAN T. NORTHCUTT, ESQUIRE, Ashley Tower, Suite 1600, P. O. Box 3429, Tampa, Florida 33601-2429, this 11th day of June, 1994.

COUNSEL FOR PETITIONER/RESPONDENT