IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CHADWICK BANKS,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

CASE NO.: 83,774
LOWER CASE **NO.: 92-841-CFA**

On appeal from the Circuit Court of **the** Second Judicial Circuit, in and **for** Leon County, Florida

AMENDED REPLY BRIEF OF APPELLANT

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ARGUMENT

ISSUE I:

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

Appellee asserts that appellant failed to preserve the question of the trial court's jury instruction as to "cold, calculated, and premeditated." (Answer Brief of Appellee at 8). Appellee correctly notes that appellant's trial counsel objected to the standard jury instruction as to "cold, calculated, and premeditated;" but appellee incorrectly states that trial counsel did not appear to have submitted an alternative jury instruction. (Answer Brief of Appellee at 8). **Trial** counsel submitted special defense requested jury instructions (T-869). At page 869 of the transcript of the proceedings, the following appears:

> THE COURT: Good morning. Any matters to take up before the jury in brought in?
>
> MR. SELIGER: We have reviewed the instructions you've submitted, and we have submitted some specials to you. . . .
>
> * * *
>
> MR. SELIGER: So we would just note our objection to the instruction as given, over our ones we said yesterday and the one we submitted in writing.

The second supplemental record reveals trial counsel requested the following jury instruction as to "cold, calculated and premeditated:"

> The crime for which Mr. Banks is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> I instruct you, that for purposes of applying this aggravating circumstance, the state must prove that the homicide was the result of a careful plan or prearranged design. Further, for this aggravating circumstance to be found applicable to this case, the state must prove that there **was** a particularly lengthy, methodic or involved series of events, or a substantial period of reflection and thought by Mr. Banks, prior the actual homicide.
>
> If you find that the homicide of Melody Cooper was committed after a short period of reflection, then this aggravating circumstance cannot be found.
>
> I further instruct you that Mr. banks conviction for first-degree murder, even if it was premeditated, is insufficient in and of itself to conclude that the homicide **was** cold, calculated and premeditated for the purposes of this aggravating Circumstance.
>
> The law requires that there be heightened premeditation, that is, a cold-blooded intent to kill that is more contemplative, more methodical, and more controlled than the premeditation required for a conviction of first-degree murder, for this aggravating circumstance to apply.

(Supp. Record at 963). Appellee's claim that appellant failed to preserve this issue is without merit.

The jury instruction actually given by the trial judge was as follows:

> Four, the crime for which the defendant is to be sentenced was committed in **a** cold, calculated, and premeditated manner, without any pretense of moral or legal justification. Premeditation,

> within the meaning of the first degree murder law, requires proof that the homicide was committed after consciously deciding to do so. The decision must be present in the mind of the defendant at the time of the killing. The law does not fix the exact period of time that must pass before the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

(T-893-94).

Appellee asserts that trial counsel's response to the court's query regarding the sufficiency of the jury instruction was "vague and indefinite," and is insufficient to preserve any issue concerning the CCP instruction. The record reflects precisely the contrary; in fact, trial counsel objected to the proposed standard instruction, submitted a proposed alternate instruction, and against noted his objections and his request for the instruction submitted in writing at the time of the actual closing arguments. The issue is preserved for appeal.

The state also asserts in argument I that the jury instruction as to "cold, calculated, and premeditated" was properly read to the jury . (Answer Brief of Appellee at 12). Appellee relies on Hunter v. State, 660 So.2d. 244 (Fla. 1995), for the proposition that the jury should be instructed on aggravators for which "credible and competent evidence has been presented." (Answer Brief of Appellee at 12). Appellant asserts that appellee's position is ill-founded, and argues that no credible and competent

evidence as to the CCP aggravator was presented to the jury. In Hunter, this court relied on Atkins v. State, 452 So.2d. 529 (Fla. 1984), to distinguish the actual sentencing from the penalty phase, 660 So.2d. at 252. This court was very clear in its holding that a trial judge "should instruct a jury *only* on those aggravating circumstances for which credible and competent evidence has been presented." 660 So.2d. at 252. (Emphasis supplied).

In Hunter, this court reviewed the record and determined that credible and competent evidence did exist to support the giving of the "cold, calculated, and premeditated" instruction. This court relied on the fact that Hunter had "deliberately and successively fired bullets from a handgun into four human beings lying helplessly on the ground without any apparent reason or justification." Because the fourth and last person to be shot had experienced the first three shootings, this court determined that evidence existed to support the "cold, calculated, and premeditated" aggravator, and that it was therefor not error for the trial court to have *so* instructed the jury. 660 So.2d. at 252.

Appellee asserts that the evidence is sufficient to support a finding that appellee "planned at the outset" to commit the murder of Melody Cooper. (Answer Brief of Appellee at 13). However, this is sheer speculation on the part of appellee, and nothing in the record sustains such an argument. Appellee argues that appellant had "obviously" formed the prearranged design to kill the second victim because her bedroom was located at the opposite end of the mobile home. (Answer Brief of Appellee at 14). Additionally,

appellee asserts that the murder of Melody Cooper was a "protracted execution style slaying. (Answer Brief of Appellee at 14). Neither of these contentions is sustained by a careful reading of the record; the state lays conjecture upon conjecture in order to reach these conclusions which should be disregarded by this court.

The trial court erred in instructing the jury as to the cold, calculated, and premeditated factor; moreover, because the trial court's actual instruction was deficient under the doctrine of this court in Jackson v. State, 648 So.2d. 85 (Fla. 1194), and because trial counsel adequately preservedthe issue for appeal, this court should reverse the imposition of the death sentence and remand this cause for a new sentencing hearing.

ISSUE 11:

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL

Appellant relies on the argument set forth in his initial brief in support of this issue.

ISSUE III:

THE TRIAL COURT IMPERMISSIBLY DOUBLED THE STATUTORY AGGRAVATORS OF "DURING THE COMMISSION OF A FELONY" AND "HEINOUS, ATROCIOUS AND CRUEL"

Appellee relies primarily upon Lightbourne v. State, 438 So.2d. 380 (Fla. 1983), and Reed v. State, 560 So.2d. 203 (Fla. 1990), to refute appellant's contention that the trial court improperly doubled the aggravating circumstances "during the commission of a felony," and "heinous, atrocious, or cruel." (Answer brief of appellee at 23). Lightbourne and Reed are distinguishable, and are inapplicable to the issue at hand. In Lishtbourne, supra, the issue was never raised whether the statutory aggravators "heinous, atrocious, or cruel," and "during the commission of a felony" merged. Moreover, this court specifically stated that it had considered "the totality of circumstances" in Lightbourne. 438 So.2d. at 391. This is unlike the instant case, where the trial court's sole justification for the finding of the "heinous, atrocious, or cruel" aggravator was the fact that the victim Melody Cooper had been sexually assaulted. Lightbourne is inapplicable to the facts of this case.

Additionally, in Reed, this court enumerated several factors that sustain the finding of "heinous, atrocious, or cruel." Most notably among these factors was the fact that Reed had slashed the victim's more than a dozen times with a serrated-edge knife, causing injuries that would have taken more time and effort to inflict, (thereby causing more agony to the victim). 560 So.2d. at 207. No independent sustaining facts of the HAC aggravator exists

in this case; nor were any enumerated. Therefore, Reed is inapplicable to the facts of this case.

Appellee also asserts that the two statutory aggravators were not based upon the same essential features of the offense, and cites Larzelere v. State, __ So.2d. __, 21 F.L.W. S 147 (Fla. March 28, 1996). Larzelere stands for the proposition that "in a given case [the facts] may support multiple aggravating factors providing the factors are not based on the same essential feature of the crime." __ So.2d. at-, 21 F.L.W. at S 151. In Larzelere, the court noted

> In this case, the aggravating circumstance of committed for financial gain was based on the evidence that appellant killed her husband to collect life insurance; the factor of CCP was based on evidence that she meticulously staged her husband's murder to look as though it were committed during a robbery.

__ So.2d. at __; 21 F.L.W. at S 151. This court held that under those circumstances, the trial judge had not improperly duplicated the two aggravating factors.

The instant case is unlike Larzelere and can be distinguished. There are not any separate, independent factors enumerated under the trial court's finding that the homicide had been committed in a fashion that was heinous, atrocious, or cruel. The trial court relied solely upon the sexual battery to make this determination; this sole reliance upon the offense of sexual battery violates the doctrine of Larzelere, and cannot be sustained. Because the finding of the statutory aggravator "heinous, atrocious and cruel: cannot be found in this case, the sentence of death in this case

should be vacated and a sentence of life without parole for twenty-five years imposed.

ISSUE IV.

THE TRIAL COURT ERRED IN INSTRUCTING THE PENALTY PHASE JURY THAT APPELLANT'S PRIOR CRIMES OF AGGRAVATED ASSAULT COULD BE CONSIDERED IN DETERMINING WHETHER AN AGGRAVATING FACTOR EXISTED

Appellant relies on the argument set forth in his initial brief in support of this issue.

ISSUE V.

THE TRIAL COURT ERRED IN INSTRUCTING THE PENALTY PHASE JURY THAT THE MURDER WAS COMMITTED DURING THE COMMISSION OF A SEXUAL BATTERY, WHEN THE SAME WAS AN UNDERLYING FELONY FOR PURPOSES OF FIRST DEGREE FELONY MURDER

As appellee notes in its answer brief, the cases on which it relies recognize that the "requisite narrowing can occur at the guilt phase of the trial." (Answer brief of appellee at 29-30). Because there **was** no guilt phase testimony at this trial, these cases are inapplicable. Appellant relies on the argument set forth in his initial brief as to this point.

ISSUE VI.

THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING OR IN ASSIGNING ONLY SLIGHT OR LITTLE WEIGHT TO THE NON-STATUTORY MITIGATING FACTORS WHICH APPELLANT PROVED

Appellant relies on the argument set forth in his initial brief in support of this issue.

CONCLUSION

The trial court erred in finding the homicide in this case to be "especially heinous, atrocious, or cruel," and erred in finding that the offense was committed during the commission of a sexual battery. Because only three aggravating factors were proved, the improper determination that these two aggravators existed, coupled with the significant evidence of mitigation, mandates that the death sentence in this case be set aside and this cause be remanded for the imposition of a life sentence with no possibility of parole for twenty-five years.

Alternatively, because the trial court erred in its instructions to the penalty phase jury, this case must be reversed and remanded for a new penalty phase hearing before a new jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301, by regular United States Mail this 21st day of August, 1996.

Teresa J. Sopp
Attorney for Appellant