IN THE SUPREME COURT OF FLORIDA

MICHAEL THOMAS COOLEN, :

Appellant :

vs. : Case No. 84,018

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Appellee's rendition of the facts may be misleading on certain points. Accordingly, Appellant submits the following to provide the context and to clarify the import of these statements:

1. "James Caughman testified that ... Michael was mad because John had picked up his beer right before the fight started." Brief of Appellee, page 2. The record shows that ten-year-old James testified first:

> Q. Tell us what you heard or what you saw, the very first thing when you went around the building. What you saw or heard.
>
> A. I saw that they were fighting over the beer can.
>
> Q. Did you hear anything said before the fighting over the beer can?
>
> A. No.

(T376). Then James further testified:

> Q. Did your step-dad [John Kellar] get angry that night at all? Upset at anybody?
>
> A. Yes.
>
> * * *
>
> Q. What did he get upset about?
>
> A. Michael [Coolen] picking up his beer can.
>
> Q. Michael picking up his beer can?
>
> A. Yes.

(T383). James then contradicted his first statement:

> Q. Was Michael angry at John that night?
>
> A. Yes.
>
> Q. Why?

A. Because my dad picked up his beer.

Q. Is that what Michael said to your dad?

A. Yes.

Q. What did he say?

A. He said, "That was my beer."

Q. When in relation to that conversation did Michael start attacking him with a knife?

A. At the end.

Q. Was it right after that?

A. Yes.

(T388). James then returned to his second assertion:

Q. Did John get mean or angry with anybody that night?

A. Michael.

Q. Just with Michael?

A. Yes.

Q. What did he say to Michael to get mean with him?

A. He said, "Don't pick up my beer again."

(T389).

2. Appellee writes in her brief, "Deputy Wright testified that [he] couldn't tell if Coolen was drinking but he was not under the impression that he was dealing with a drunk person". Brief of Appellee, page 2. The context of this assertion is provided by this excerpt from Deputy Wright's testimony:

Q. Could you tell whether he had been drinking?

A. No, sir. I was standing a significant distance away for officer safety.

Q. You never got close enough to him.

A. No, sir.

(T251).

3. With reference to Deputy Peay's testimony, Appellee writes, "Coolen appeared to be intoxicated; he said he'd been drinking but, didn't say how much or how long". Brief of Appellee, page 3. Deputy Peay first testified that Coolen was intoxicated; then, in response to questioning, he said:

> A. They said that they had been out there at the Harley Davidson fest most of the day. We never really went into how much and how long he had been drinking.

(T279).

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO PROVE A PREMEDITATED KILLING

Appellee asserts that the nature of the knife wounds "are not only inconsistent with Coolen's claim of self-defense, but are evidence of the premeditated nature of the attack". Brief of Appellee, page 16-7. However, the nature of the wounds only show that the stabbing was not accidental. It is certainly consistent with self-defense to stab the adversary with great force in order to protect yourself. Also, there was nothing about the wounds from which the jury could infer premeditation as opposed to a second degree murder or manslaughter.

Appellee also accuses Appellant of misapprehending "this Court's holding in Banda." Brief of Appellee, page 18. Appellant is well aware that the holding in Banda v. State, 536 So. 2d 221 (Fla. 1988) concerns only the cold, calculated aggravating circumstance. That is why Appellant specifically labelled as "dicta" the language in Banda alluding to a form of self-defense which could "reduce the degree of the crime". By using the language "degree of the crime", Appellant reasons that the Banda court was, in fact, contemplating circumstances under which self-defense would not provide complete justification; but would reduce first degree murder to a lesser offense.

As Appellant wrote in his initial brief, the doctrine of imperfect self-defense is well-established in several other

jurisdictions. In Florida, it is currently in embryonic stage. The case at bar provides the appropriate set of facts for this Court to recognize that a killing motivated out of an unreasonable, but honest subjective belief in the need for self-defense does not rise to the level of culpability necessary for premeditated murder.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCISE PORTIONS OF HIS TAPED STATEMENT TO THE POLICE WHICH REFERRED TO HIS PRIOR CRIMINAL RECORD AND PRISON SENTENCES IN MASSACHUSETTS.

Appellee's brief on this issue relies primarily on Jackson v. State, 498 So. 2d 406 (Fla. 1986) - the same case argued by the prosecutor in the trial court and cited by the trial judge in his ruling. However, Jackson concerns a defendant's statement that she shot a police officer because she didn't want to go back to jail. Thus, it was a clear admission of motive and motive is always relevant evidence. Moreover, Jackson's statement was nowhere near as prejudicial as Coolen's because it did not reveal whether her previous jail residence was for a minor or major offense.

By contrast, Coolen's prior prison record was not the motive for stabbing John Kellar. Kellar was in no way threatening to return Coolen to prison. The only motive was Coolen's mistaken perception that Kellar had a weapon in his hand and was about to attack him.

Appellee further contends that the prison record evidence was relevant to show Coolen's state of mind. Brief of Appellee, page 20, 22. However, it is questionable whether state of mind is particularly relevant to the type of self-defense claim presented by Coolen. State of mind may be relevant where the defendant is relying upon battered spouse syndrome to establish a claim of self-defense. See e.g., State v. Hickson, 630 So. 2d 172 (Fla. 1993). But Appellant is unaware of any scientific studies supporting a "battered convict syndrome" which would make Coolen's prison experience relevant to justify acting in self-defense. In any case, at trial, Coolen sought to exclude mention of his prison record rather than to use it as justification for his quick resort to violence.

Accordingly, the question for the jury was whether Coolen's reaction was that of a reasonable man from an objective point of view. Coolen's state of mind is hardly relevant to that inquiry. If it is relevant at all, its probative value is clearly outweighed by prejudice.

Appellee's further claim that any error in admitting evidence of Coolen's past criminal record was harmless cannot stand up to scrutiny. While a review of the record might show that Coolen would have been convicted of some degree of homicide, absent the prejudicial effect of his prior criminal history; the jury might well have returned a verdict of manslaughter.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING TESTIMONY FROM JAMES CAUGHMAN ABOUT A THREAT APPELLANT ALLEGEDLY MADE TOWARDS HIM EARLIER BECAUSE ITS SOLE RELEVANCE WAS TO PROVE BAD CHARACTER.

Appellee argues in her brief that the alleged incident with Jamie was inseparable crime evidence, admissible on the general ground of relevancy. However, Professor Ehrhardt in his treatise, Florida Evidence, describes the parameters under which such evidence is admissible:

> this evidence is not admitted because it shows the commission of other crimes or because it bears on character, but rather because it is a relevant and inseparable part of the act which is in issue. This evidence is admitted for the same reason as other evidence which is a part of the so-called "res gestae;" it is necessary to admit the evidence to adequately describe the deed.

1995 edition, §404.17.

At bar, it is clear that the alleged pulling of a knife on the nine-year-old child was an independent act from the stabbing of John Kellar. The circumstances surrounding the stabbing of John Kellar were completely described without reference to the alleged aggravated assault on the child. Thus, it was not necessary to admit this alleged act in order to "adequately describe the deed" [stabbing of John Kellar].

The evidence at bar is most comparable to evidence found inadmissible in Valentine v. State, 616 So. 2d 971 (Fla. 1993). In Valentine, an admissible taped telephone conversation with the defendant's ex-wife included a portion where the young daughter got

on the phone and Valentine verbally abused her. This Court held that the conversation with the daughter "was inflammatory and irrelevant". 616 So. 2d at 974.

The same is true with regard to the alleged threat made by Coolen to young Jamie Caughman. It is highly inflammatory because it portrays Coolen as dangerous to children. It is irrelevant to the later stabbing of John Kellar which was provoked by an entirely different set of circumstances. Accordingly, Coolen should be retried without bringing this alleged incident into evidence.

ISSUE IV

THE TRIAL COURT IMPERMISSIBLY LIMITED APPELLANT'S CROSS-EXAMINATION OF STATE WITNESS BARBARA CAUGHMAN-KELLAR BY NOT ALLOWING QUESTIONING ABOUT THE NATURE OF THE CRIMINAL CHARGES AGAINST HER.

To begin with, Appellee's assertion that Barbara Caughman-Kellar was "charged with soliciting sexual activity, a third degree felony" (Brief of Appellee, page 28) should be corrected. Caughman-Kellar was actually charged with sexual battery, which was reduced to soliciting sexual activity so that she would qualify for the pre-trial intervention program (T337-8).

Appellee does not really contest Appellant's position that he has an absolute right to bring out the nature of the charges against a witness on cross-examination. Rather, she urges that the probative value of the witness' criminal conduct was "outweighed by the potential for prejudice or confusion of issues". Brief of

Appellee, page 32. In Appellant's view, Appellee's real complaint is that Barbara Caughman-Kellar's credibility would have suffered by permitting the cross-examination. Appellant's Sixth Amendment right to confrontation of adverse witnesses must prevail and Coolen's cross-examination of the witness should not be limited on retrial.

ISSUE V

APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN MITIGATION WAS VIOLATED WHEN THE TRIAL JUDGE BARRED A DEFENSE WITNESS FROM TESTIFYING ABOUT THE REASON THAT APPELLANT DID NOT RECEIVE NEEDED PSYCHIATRIC TREATMENT WHEN HE WAS A CHILD.

Appellee takes the position that "admission or exclusion of [mitigating] evidence is a matter that lies within the trial court's discretion". Brief of Appellee, page 36. She maintains that the rules of evidence should apply equally to the state and the defense during the penalty phase.

However, the United States Supreme Court has said that the Eighth Amendment bars a state from limiting the capital sentencer's consideration of mitigating evidence "merely because it places the same limitation on consideration of aggravating circumstances". McKoy v. North Carolina, 110 S.Ct. 1227 at 1233-4 (1990). A state may not exclude evidence which could cause the sentencer to impose a sentence less than death. Id.

At bar, the jury never heard that Coolen had been found at an early age to need professional counseling and that he never got it

because of his mother's angry reaction to the doctors' suggestion that she needed counseling as well. This is relevant mitigating evidence which bears upon whether a death sentence should have been imposed. A new penalty trial is mandated by the Eighth Amendment.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO GO TOO FAR IN PRESENTING DETAILS OF COOLEN'S PRIOR CONVICTIONS, ALLOWING INTO EVIDENCE EXTRANEOUS WRITTEN INFORMATION ON THE PRIOR JUDGMENTS, AND ALLOWING THE PROSECUTOR TO FEATURE THIS IRRELEVANT AND PREJUDICIAL MATERIAL IN CLOSING ARGUMENT.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR A PENALTY JURY INSTRUCTION ON "LACK OF INTENT TO KILL THE VICTIM" AS A MITIGATING CIRCUMSTANCE OF THE OFFENSE.

Since filing his initial brief, Appellant has discovered a case on point. In State v. Fierro, 804 P. 2d 72 (Ariz. 1990), a burglar was interrupted by the homeowner, who fired a warning shot. The burglar, fearing for his life, shot and killed the homeowner. The Arizona court, in reviewing the death sentence imposed, first observed that the burglar had no right to self-defense under the circumstances. But the burglar's lack of prior intention to kill

the homeowner and the fact that he shot only out of fear for his own life were relevant mitigating circumstances which should have been considered and weighed. 804 P. 2d at 87-8. See also, Evans v. State, 601 S.W. 2d 943 (Tex. Crim. App. 1980).

At bar, Coolen's claim of self-defense, even if insufficient to prevent his conviction for premeditated murder, was highly relevant to mitigation and should have been considered by the penalty jury. The Eighth Amendment, United States Constitution requires that the capital sentencer be allowed to consider any aspect of the offense which might serve as a basis for a sentence less than death. McKoy v. North Carolina, 110 S.Ct. 1227 (1990). Cf., Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988) (refusal to consider evidence supporting claim of domination by co-defendant violated 8th Amendment).

Appellee's remaining point is that "the jury was given the catchall instruction that they could consider any other aspect of the defendant's character". Brief of Appellee, page 48. Indeed, this Court has held that there is no error when the trial judge declines to instruct the penalty jury on specific nonstatutory mitigating circumstances as long as the "catchall" instruction is given. Robinson v. State, 574 So. 2d 108 (Fla. 1991).

However, there is a big difference between giving no specific instructions on the nonstatutory mitigating evidence (solely the "catchall") and giving specific instructions on all of the proposed nonstatutory mitigating circumstances except the most important one. At bar, the judge instructed the penalty jury on a list of

nine specific mitigating circumstances (seven of which were nonstatutory) plus the "catchall" (R1308-9). Since some of the mitigators on the list were pretty weak, it is very unlikely that the jury gave any substantial consideration to any mitigating factor not specifically listed.

Consequently, this Court should require that specific instruction be given on all supported nonstatutory mitigating factors if a specific instruction is given on any one of them. Cf., Bryant v. State, 412 So. 2d 347 (Fla. 1982) (defendant entitled to instruction on theory of defense when there is evidence to support it). Otherwise, the nonstatutory factors which the judge declines to instruct upon will be denigrated in the eyes of the jury.

Because Appellant's penalty jury would not have considered Coolen's lack of intent to kill the victim despite his request for jury instruction on this factor, Coolen's death sentence was unreliably imposed in violation of the Eighth and Fourteenth Amendments, United States Constitution. A new penalty trial before a newly impaneled jury must be held.

ISSUE VIII

THE SENTENCING JUDGE ERRED BY REJECTING THE STATUTORY MITIGATING CIRCUMSTANCE OF SUBSTANTIALLY IMPAIRED CAPACITY, OR AT LEAST FINDING THAT APPELLANT'S DRINKING PROBLEM AND USE OF INTOXICANTS ESTABLISHED A NONSTATUTORY MITIGATING CIRCUMSTANCE.

Appellee defends the sentencing judge's rejection of Coolen's intoxication as either statutory or nonstatutory mitigating evidence. She asserts that such statements as "there was no testimony that the Defendant was drunk, or even highly intoxicated" (Brief of Appellee, page 52) and "he was not so intoxicated that he was incapable of rationale [sic] thought and action" (Brief of Appellee, page 56) from the sentencing judge's order refuted the mitigation. Moreover, the court relied on the absence of expert testimony on "the Defendant's alcoholism or drug dependency or the effect of alcohol on his actions on the night of the murder" as a reason to reject the mitigating evidence. Brief of Appellee, page 52.

To begin with, Barbara Caughman-Kellar and Debra Morabito were witnesses to the whole course of events on the day of the homicide. Surely their testimony about Coolen's level of intoxication is more reliable than that of witnesses who had a brief encounter with Coolen. Both Caughman-Kellar and Morabito testified that there was continuous beer drinking from the time that they met around 4 o'clock in the afternoon until the stabbing (T323, 327, R1230). Both agreed that everyone was intoxicated (T328, 351, 358, R1230).

Lab tests showed that the stabbing victim, John Kellar, had a blood alcohol level of .22, or nearly three times the level necessary to qualify for DUI in Florida (T445). This is "drunk" by any reasonable definition of the term. There is no reason to believe that Coolen's blood alcohol level was any lower than Kellar's. Clearly, Appellant met the burden of establishing his intoxication at the time of the offense.

Appellee compares the evidence of intoxication presented in Nibert v. State, 574 So. 2d 1059 (Fla. 1990) and faults Coolen for not presenting expert testimony. Brief of Appellee, page 53. However, the evidence of Nibert's intoxication on the day of the homicide was limited to his own statements to the psychologist as corroborated by a partially finished six-pack of beer at the homicide scene. Because this evidence was unrefuted, this Court found that Nibert established the statutory mitigating circumstance.

Coolen actually established more convincing evidence of intoxication. There was no reason to present testimony from an expert when there were compelling eyewitness accounts. Certainly it is within the knowledge of the average juror that a drunk is more likely to get into a fight than a sober person. There was ample evidence of some degree of impaired capacity which contributed to this homicide and should have been found as mitigation by the sentencing judge.

ISSUE IX

THE SENTENCING JUDGE ERRED BY A) FAILING TO FIND THAT APPELLANT PROVED A NONSTATUTORY MITIGATING CIRCUMSTANCE WITH EVIDENCE OF HIS FAMILY BACKGROUND AND; B) FAILING TO GIVE ANY WEIGHT TO TWO NONSTATUTORY MITIGATING FACTORS WHICH HE DID FIND.

Appellee's brief quotes at length from the sentencing order and basically argues that "[s]uch positive character traits are routinely accepted as having little mitigation value". Brief of Appellee, page 63. This Court has not demeaned such evidence at all. In Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988), it was explained:

> Evidence indicating potential for rehabilitation, although not mitigating in the sense that it diminishes the defendant's culpability for the crime he committed, is clearly mitigating in the sense that it might serve as a basis for a sentence less than death.

526 So. 2d at 902.

Furthermore, Appellee fails to address Appellant's argument that the sentencing judge erred when he found that Coolen's employment background and his participation in self-help programs were established as mitigating circumstances, but entitled to no weight.

ISSUE X

COOLEN'S SENTENCE OF DEATH IS DISPROPORTIONATE.

First, Appellant must take issue with Appellee's assertion that Kellar was in "his own home" when the homicide occurred.

Brief of Appellee, page 66. The record shows that all of the events surrounding the stabbing took place in a wooded area behind the Kellar's duplex apartment (T326-7).

Recently in Terry v. State, 668 So. 2d 954 (Fla. 1996), a majority of this Court reaffirmed the principle that a sentence of death is "reserved only for those cases where the most aggravating and least mitigating circumstances exist". 668 So. 2d at 965. Although the Terry court found "not a great deal of mitigation in this case" and two aggravating circumstances, the sentence of death was reduced to life based on the totality of the circumstances. 668 So. 2d at 965-6.

Comparing Terry to the case at bar, we should first observe that Coolen has only the prior violent felony aggravator. He was not committing a robbery like Terry when the homicide took place. Even more significant is that Coolen's case is more mitigated. Death simply is not a proportionate penalty when the homicide is prompted by a mistaken belief that the defendant himself is being attacked and must defend himself.

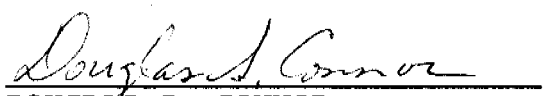
CONCLUSION

Appellant will rely on his conclusion as presented in his initial brief.

CERTIFICATE OF SERVICE

I certify that copies have been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, and Michael T. Coolen, Inmate No. 312501, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083 on this 31st day of May, 1996.

Respectfully submitted,



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