IN THE SUPREME COURT OF FLORIDA

DWAYNE KIRKLAND,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,353

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT CALHOUN COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The initial brief in this case raised nine issues. The State's answer brief responded to each issue. In this reply brief Mr. Kirkland chooses to discuss the State's position on the following issues:

1. Motion for Judgment of Acquittal
2. Attempted Sexual Battery Aggravator
3. Heinous, Atrocious, Cruel Aggravator - Lack of Evidence
4. Competency to be Sentenced, and
5. Death as a Disproportionate Sentence.

Mr. Kirkland believes it is unnecessary to reply to the State's position on the remaining four issues. He relies on the arguments made in his initial brief.

TRIAL COURT ERRED IN NOT GRANTING MR. KIRKLAND'S MOTION FOR A JUDGMENT OF ACQUITTAL.

The State argues that four factors demonstrate a sufficient basis for a finding of premeditation: (1) the kind of weapons used by Kirkland; (2) how Kirkland killed the victim; (3) the number and location of the victim's injuries; and (4) testimony that Kirkland knew right from wrong. (State's Answer Brief (SAB) page 14)

The fourth factor relates to Mr. Kirkland's mental illness. There was consensus among the mental health experts that Kirkland suffered from some sort of psychosis and was mentally retarded. Although this mental status does not preclude a finding of premeditation, it certainly impacts on Kirkland's capacity to reflect and deliberate. These are the ingredients necessary to be found before the premeditative label can be ascribed to a killing.

The other three factors are those allowed by this Court to be used by a jury to find premeditation. Kearse v. State, 622 So. 2d 677, 681-682 (Fla. 1995). They are circumstances of the homicide and as such must be found "to the exclusion of all other inferences." Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). This the State failed to do.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED DURING THE COURSE OF AN ATTEMPTED SEXUAL BATTERY.

The State argues that the defense conceded that the "killing" occurred as a consequence of and while engaged in the sexual battery." (SAB page 16) It is important to note in what context that this statement by a lawyer was made. The lawyers and the trial court were discussing the homicide jury instructions. The defendant's lawyer raised the point that third degree murder should be a choice for the jury because "the death occurred as a consequence of and while engaged in the sexual battery." (TR-867) As the prosecutor correctly noted in response, this allegation would be appropriately first degree felony murder. All the parties then agreed third degree murder was not available on the facts of the case. (TR-867) The State never sought any instruction on the supposed sexual battery conduct related to the murder.

The totality of the State's evidence is Mr. Kirkland talking about having sex with the victim and the description of the victim as partially clothed. There is nothing to indicate that the victim was not dressed to go to sleep in the precise manner that she was found. No other clothing was discovered that would provide a factual basis for support of this aggravator. None of this information rises to a level of proof beyond a reasonable doubt which is likely why the State did not charge Mr. Kirkland with this offense nor present any evidence to the jury during sentencing.

Finally, the State argues that, "Even if this Court decides that this aggravator should be struck, however, no relief is warranted. Striking this aggravator would leave two others, and any error would be harmless." (SAB page 17) This analysis is wrong on every level. Removing this aggravator from the weighing process would eliminate a substantial reason for imposing the death sentence. In addition, this statement ignores the fact that the sentencing judge found mitigation. Any error would not be harmless.

THE EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT A FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS OR CRUEL.

The State allows that the trial court's findings in support of this aggravator are "somewhat melodramatic" (SAB page 20) and contain "minor inaccuracies". (SAB page 23) In addition, the State argues that a lack of evidence on vital factual points bolsters the trial court's finding in support of this aggravator.

Mr. Kirkland's initial brief sets out the proper legal standard for evaluating this claim. Contrary to the State's position, the medical examiner testified that the victim died within seconds of her neck being cut. No other wound caused any significant injury. This being so, this case is more factually analogous to a shooting death.

Further, there was no evidence presented about the victim's "fear and emotional strain preceding [her] death." Therefore, the "mind set or mental anguish of the victim" cannot be used to buttress this aggravator.

By contrast, in Allen v. State, 662 So. 2d 323, 331 (Fla. 1995), the medical examiner's testimony demonstrated that prior to her throat being cut, the victim was bound at her ankles and wrists. After the fatal wound was inflicted, the victim remained conscious for fifteen minutes while she bled to death. These facts are inconsistent with the evidence offered by the State about Coretta Martin's death.

MR. KIRKLAND WAS NOT COMPETENT TO BE SENTENCED.

The State's interpretation of the events surrounding the competency of Mr. Kirkland at the time of sentencing is at odds with the recorded history. The doctor who prescribed the medication to Mr. Kirkland (see SAB page 31, note 3) specifically had no opinion as to Kirkland's competency. This was consistent with the doctor's role at the time, which was to respond to a perceived medical problem. Competency is ultimately a legal conclusion.

Mr. Kirkland's lawyer made a specific objection to the sentencing proceeding happening because he perceived Mr. Kirkland was not competent. There was no "tacit agreement among all concerned that Kirkland was competent to proceed" at sentencing. (SAB page 33) The trial court must have intuitively believed this because he did not ask for any additional information from any of the mental health experts who had previously examined Mr. Kirkland. Nor did the trial court inquire of Mr. Kirkland personally. The trial court's failure to ensure that Mr. Kirkland had an understanding of the nature of the proceedings at the time of sentencing was error.

DEATH IS A DISPROPORTIONATE SENTENCE FOR MR. KIRKLAND.

The State presumes that this Court will uphold all three found by the trial court. Mr. Kirkland does not have this same confidence; properly viewed, this murder is not among the most aggravated and unmitigated of crimes.

The cases cited by the State do not support its argument. Emmanuel Johnson killed two people, Johnson v. State, 660 So. 2d 648 (Fla. 1995) and 660 So. 2d 637 (Fla. 1995), a controlling fact not present in Mr. Kirkland's case.

There are two differences between Mr. Kirkland's case and Finney v. State, 660 So. 2d 674 (Fla. 1995). Mr. Kirkland's mitigation was substantially more powerful and Finney's prior violent felony was the rape/robbery of a woman who testified as to the circumstances of that offense. The victim in the rape/robbery was bound and gagged in a similar manner as the murder victim. The State presented Mr. Kirkland's prior violent felony by way of a paper record.

That record consisted of a juvenile aggravated assault conviction and an aggravated battery conviction six years later.

The killing described in Dailey v. State, 659 So. 2d 246, 247 (Fla. 1995) (See also Dailey v. State, 594 So. 2d 254, 255-256 (Fla. 1991)), is infinitely more brutal than the murder committed by Mr. Kirkland. In addition, Mr. Dailey specifically requested that he be sentenced to death. Again, the mitigation evidence in

Mr. Kirkland's case was qualitatively different; his mental illness and mental retardation are matters not found in any case cited by the State. For example, in Watson v. State, 651 So. 2d 1159, 1160 note 1 (Fla. 1994), the trial court found no mitigation.

In Castro v. State, 644 So. 2d 987, 991 note 3 (Fla. 1994), it appears that Castro was convicted of a second murder and this was used in deciding the propriety of the sentence. In addition, while Castro had established some important mitigation, it did not have the same causal effect as Kirkland's mental illness.

In Taylor v. State, 630 So. 2d 1038, 1039 (Fla. 1993), the victim was stabbed, strangled and sexually assaulted. The strangulation occurred after the victim had been stabbed. In addition, the victim's lower jaw had multiple fractures which could have resulted from being struck by a broken bottle. The victim also was hit by a metal bar and candlestick. Taylor was found to be mildly retarded, although the evidence in this respect was scant. No other evidence of Taylor's mental health was ever presented.

The aggravation in Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1987), consisted of Tompkins having been convicted of two prior kidnappings and sexual batteries. The trial court found only one mitigating factor, Tompkins' age.

Compared to similar cases, Mr. Kirkland's death sentence is not usual. The aggravation is not strong and the case for life is.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished to the following on this 13th day of ~~January~~ February, 1996.

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