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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,370

MARBEL MENDOZA,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

LAW *OFFICES* OF
JOHN H. LIPINSKI
1455 N.W. 14 STREET
MIAMI, FLORIDA 33125
(305) 324-6376

Counsel for Appellant

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The appellant would respectfully adopt the Introduction, Statement of the Case and Statement of the Facts, and Summary of the Argument as stated in his initial brief.

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I

THE EVIDENCE PRESENTED WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THIS DEFENDANT FOR BURGLARY REQUIRING THE VACATION OF BOTH HIS BURGLARY AND FELONY MURDER CONVICTIONS

The state argues in its brief (p. 30) that the victim Calderon's house constitutes the enclosed curtilage prescribed by this Court in State v. Hamilton, 660 So.2d 1038 (Fla. 1995), so as to justify a conviction on a felony-murder (burglary) theory. The appellant disagrees. iie would again note that there was no testimony as to Calderon's house being enclosed. The state refers to pictures of Calderon's home (R. 182, 351). These pictures do not submittedly show the enclosed space contemplated by this Court in Hamilton, supra. The piature at (R. 182) shows a home with a very open front. The appellant again submits that the facts of this case would not support a conviction on a Burglary Felony-Murder theory. See, N.S.G. v. State, 21 Fla.L.Weekly D1990 (Fla. 1st DCA 1996).

The state then argues that this error was not preserved." In Arline v. State, 303 So.2d 37 (Fla. 1st DCA 1974), the Court found that Motions for a Direct Verdict and Motion for New Trial preaervcd the issue of the insufficiency of the evidence. Additionally, if defendant's conduct did not constitute Burglary

(as necessary to convict for a burglary Felony-Murder) his Conviction would constitute fundamental error which could' be addressed in the absence of an objection below. See, Hornsky v. State, 680 So.2d 598 (Fla. 2d DCA 1996); Brown v. State, 652 So.2d 877 (Fla. 5th DCA 1995); K.A.N. v. State, 582 So.2d 57 (Fla. 1st DCA [illegible].

No one knows under what theory the appellant was convicted of Felony Murder. The state chose to charge and argue Burglary Felony-Murder. In doing so, It assumed the risk that the jury may convict appellant of a felony murder not supported by the facts. The state wishes this Court to affirm a conviction and sentence of death that the jury/fact finder may have rendered for a crime (Burglary Felony-Murder) that, submittedly was not proven under these facts. The appellant submits that it is wrong to speculate or guess him into the electric chair *in* the absence of a clear determination by the Jury that his finding of guilt and sentence Of death was not predicated *upon* a non-existent crime. This is true especially when the Jury was improperly instructed as to Burglary (T. 1467) and its advisory sentence recommendation was 7 to 5, one short of a Life Recommendation.

Appellant again submits that his conviction for Burglary and Felony Murder conviction poasibly based on that Burglary must be Reversed.

II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS SUBSTANTIVE EVIDENCE, THE PRIOR SWORN STATEMENT OF HUMBERTO CUELLAR

The state aubmits that Cuellar's prior consistent statement was properly admitted pursuant to §90.108, Fla.Statutes. In the cases cited by the state, the Courts held that the prosecutionhad "opened the door", so the defense could bring the entire statement into evidence. §90.108 provides that "when a writing or recorded statement or part thereof is introduced by a party", the remainder "in fairness" may be introduced. No written or recorded statement was introduced by the defense, The rule of completeness is inapplicable where no writing or recorded statement was introduced. See, United State v. Collicott, 92 F.3d 973 (9th Cir. 1996).

In this case, Humberto Cuellar made the objected-to statement after he had been seriously wounded, taken to the hospital for treatment of his bullet wound, had his hands "swabbed" for gunshot residue by the police, and was in police custody. During his statement, he was thanked by the police for his cooperation (R. 340). Humberto Cuallar knew there had been a shooting/robbery attempt, that victim Calderon had been shot, and that he was in police custody about to be charged for that crime. His motives to implicate appellant and extricate himself are plainly evident. These motives clearly existed before he made his statement. See, Keffer v. State, 22 Fla.L.Weekly D105 (Fla. 2d DCA 1996). In

United States v. Collicott, supra, the admission of such a prior consistent statement was found to be error as the Court found that witness's motive to fabricate existed from the time she was stopped by the police. Here, too, Cuellar's motive to place the blame for Calderon's shooting was evident from the moment he was contacted, in the hospital with a bullet wound, by the police, See, Quiles v. State, 523 So.2d 126 (Fla. 2d DCA 1988).

Humberto Cuellar was the only eyewitness to the incident to testify. Expert testimony showed that it was more likely than not that he fired a weapon (T. 1183-92). His brother, Lazaro, had made statements that he also had a gun (R. 830). Allowing him to corroborate himself was reversible error. See, also, Preston v. State, 470 So.2d 836 (Fla. 2d DCA 1985).

III

THE TRIAL COURT ERRED DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING ITS OUT OF COURT COMMUNICATIONS WITH THE JURY

The cases cited by the state deal with a jurors encounter with a defense attorney (Doyle), a juror independently viewing a crime scene (White) and a bailiff's communication with jurors (McKinney).

The appellant again submits that is reversible error for a judge to communicate with jurors outside the presence of counsel. See, Curtis v. State, 480 So.2d 1277 (Fla. 1985). He submits that this communication cannot be considered harmless. See, Ivory v. State, 351 So.2d 26 (Fla. 1977).

The appellant again submits that the trial court's out-of-court communication with the jurors was reversible error.

IV

THE TRIAL COURT ERRED IN DENYING CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS PREDISPOSED TO IMPOSE THE DEATH PENALTY

The record reflects that the defense ran out of challenges (T. 584), renewed its earlier challenges for cause (T. 586) and requested an additional peremptory challenge (T. 586). The defense explained that due to the trial court's disallowance of challenges for cause, it was faced with a potential juror it did not want, Juror Alvarez (T. 588-90). The Record is clear that the defense accepted the panel, not because it wanted, to, but because the panel was "the lesser of evils", a choice it would not have had to make if the trial court had properly allowed the defense's challenges for cause. The appellant submits that he did preserve this issue by exhausting his challenges and seeking additional ones. See, Kearse v. State, 662 So.2d 677 (Fla, 1995). Due to the disallowance of a challenge for cause, Mr. Cannan, whom the defense would have challenged (T. 589) was left on the jury (T. 592). See, Trotter v. State, 576 So.2d 691 (Fla. 1990).

In view of the questioned jurors wish to expand the ultimate penalty-death, their assertions that they could be fair must be viewed with some skepticism. See, Club West, Inc. v. Tropigas of Florida, Inc., 514 So.2d 426 (Fla. 3d DCA 1987). See, also Hamilton v. St&Q, 547 So.2d 630 (Fla. 1989). Even if the question

were found to be a close one, it should have been resolved by excusing those challenged jurors. See, Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985).

Death being the ultimate penalty, this Court has found it to be reserved for the worst of crimes, first degree, and then only for the worst/most extreme first degree murders. Persons who would extend the ultimate penalty for lesser crimes do, appellant submits, possess a "predisposition for death" that renders them unfit/unable to sit as jurors in a Death Penalty case.

The appellant's Death Sentence must be Vacated.

V

THE TRIAL COURT ERRED IN EXCLUDING MITIGATION EVIDENCE DURING THE PENALTY PHASE

The appellant submits that the Mendota family asylum application would have corroborated Mrs. Mendoza's testimony as to the difficulties the family endured during the young formative years of appellant's life. The state does not disagree that the application would have provided a confirmation, in an official document, of his important testimony as to appellant's childhood travels. In Griffin v. State, 639 So.2d 966 (Fla. 1994), relied Upon by the state, that defendant wanted to introduce a newspaper article written about him as evidence of remorse. In the instant case, the asylum application would have been tangible evidence that the arduous journey testified to by Mrs. Mendoza had been previously, officially, presented, §90.803, Florida Statutes allows for the admission of statements of fact concerning personal or family history. The asylum application detailing family travels was such a statement of family history. See, Cone v. Benjamin, 27 So.2d 90 (Fla. 1946).

In Lockett v. Ohio, 98 S.Ct.2954 (1978), the Supreme Court considered the admission of mitigating evidence in a penalty phase and stated:

> We are now faced with these questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating

factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

(p. 2964-5)

The admissibility of evidence at the penalty phase is addressed by §921.141(1) Florida Statutes and states that:

Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the excuoionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

In Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 19941, this Court considered the question of mitignting family background evidence and stated:

Such evidence of family background and personal history may be considered in mitigation.

(p. 1325)

The asylum application was valid evidence of appellant's family history. It should have been allowed into evidence to be considered by the jury. See, Quinn v. State, 662 So.2d 947 (Fla. 5th DCA 1995); American Ins. Co. of Newark, N.J. v. Burson, 213 F.2d 487 (5th Cir. 1954). Its exclusion in this penalty phase, where the Jury's Recommendation was by the slimmest of votes, 7 to 5, was error.

VI

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN DEFENDANT'S OBJECTIONS AND GRANT A MISTRIAL WHERE THE STATE BOTH ELICITED THAT MENDOZA HAD PENDING ROBBERY CHARGES AND ALSO COMMENTED ON THEFT PENDING CHARGES DURING CLOSING ARGUMENT

None of the cases cited by the state address the issue presented here - Whether the state erred by bringing forth that appellant had pending robbery charges. In Perry v. State, 395 So.2d 170 (Fla. 1980); Dougan v. State, 470 So.2d 697 (Fla. 1985) and Robinson v. State, 487 So.2d 1040 (Fla. 1986), this Court held that comments such as those in the instant case constituted error. The state presented no evidence of the alleged robberies, but merely prejudiced the appellant by stating that he had pending robbery charges. The Jury Recommendation was 7 to 5. These impermissible references to pending charges could well have cost appellant a Life Recommendation, This error cannot be harmless and is, submittedly reversible.

VII

THE TRIAL COURT ERRED IN FINDING THAT THE INSTANT MURDER WAS COMMITTED FOR PECUNIARY GAIN

The appellant again submits that the trial court erred in finding that the murder was committed for pecuniary gain. Calderon was shot only after he actively resisted an attempted robbery by pulling a gun and firing at his would-be robbers, No money or property was taken from Mr. Calderon. In the cases cited by the state cash and jewelry were missing (Allen), money was missing from the store (Preston) and the victim's money and wallet were missing (Harmon). The facts of this case da not show that Mr. Calderon was murdered for money (pecuniary gain). Mr. Calderon was shot because he armed himself and tried to prevent the robbery, not to take his possessions, unlike the cases cited by the state,

The jury's improper consideration of this aggravating circumstance submittedly prejudiced it in its penalty recommendation. As it recommended death by the slimmest af margins, 7 to 5, its consideration of this submittedly improper aggravator *cannot* be harmless error.

VIII

THE TRIAL COURT ERRED IN ENTERING ITS SENTENCING ORDER

Potential For Rehabilitation

This mitigating factor was established by Dr. Toomer's testimony (T. 1583-4). There was no testimony that appellant could not be rehabilitated. The appellant again submits that it was error for this proven mitigating factor not to have been addressed by the court. See, Robinson v. State, 21 Fla.L.Weekly 5499 (Fla. 1996).

Influence of Mental or Emotional Disturbance

The testimony of Dr. Toomer was corroborated by Dr. Eisenstein, who met with appellant six times (SR. 55) and found appellant to be psychologically mildly impaired (SR. 24). Appellant's mental 6tate was underscored by the fact that appellant was receiving psychotropic medication prescribed by the clinic at TGK where he was being held (SR. 14). The appellant submits that the qreater weight of the evidence was that this mitigator existed and so should have been found by the trial court.

Capaci to Conform

Dr. Toomer testified as to appellant'6 drug usage (T. 1562-3). Dr. Castiello testified a6 to appellant's relation of drug usage (T. 8, 13, 15). Appellant disagree6 that Dr. Castiello found appellant's relation of drug usage to be unreliable, Dr. Castiello had to pinpoint the issue to elicit a response from appellant (SR. 7). The appellant submits that this mitigating factor wa6 6hown

and should have been so recognized by the trial court by the testimony of both the experts and appellant's mother (T. 1516, 1522).

Childhood Problems

Appellant's mother testified without oontradiotion to the gruelling childhood undergone by appellant (See, *initial* brief, p. 46-47). A tramactic childhood can constitute a mitigating factor. see, Larkins v. State, 655 So.2d 95 (Fla. 1995). Evidence of this mitigating circumstance had to be weighed. See, Santos v. State, 592 So.2d 160 (Fla. 1991). Since it was established by unrefuted testimony which was attempted to be corroborated by physical evidence (See, PointI), it, submittedly, had to be given some weight. See, Dailey v. State, 594 So.2d 254 (Fla. 1991). The trial court's failure to give it any weight was error.

For the above reasons, appellant submits that the trial court erred in sentencing him and that this cause must be Remanded for resentencing.

IX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE

The state does not dispute that Mr. Calderon's death occurred during a robbery where he resisted, pulled a gun and fired first, seriously injuring Humberto Cuellar and posing a life threat to the would-be robbers. The state does not dispute that other shots were then fired, some by Mr. Calderon and some by the other would-be robber, which proved fatal to Mr. Calderon. The state does not dispute that no money was taken from Mr. Calderon. The state does not dispute that the fatal shots were fired as Calderon himself was firing or while the would--be robbers were attempting to escape. The state does not dispute that its own evidence, chief witness Humberto Cuellar, demonstrated that Calderon fired first.

This case is unlike those cited by the state in that, in those cases there was no violent resistance by the victim (Lamb, Heath) as there was here: Calderon was not shot trying to run (Smith); there were no prior death threats before a fight with an unarmed victim (Watts); Calderon was armed (Cook, Hudson) and here Calderon fired first at the would-be robbers (Freeman). As in the case of Terry v. State, 668 So.2d 954 (Fla. 1996), the instant case was a "robbery gone bad". Unlike Terry, Humberto Cuellar testified to what transpired before Calderon was shot. Calderon pulled a gun ahd began to fire at his would-be robbers. As in Terry, the trial court found the aggravators of a prior violent felony and felony

committed during an armed robbery/pecuniary gain. As in Terry, the trial court found minimal mitigating circumstances.

Additionally, in tha instant case, the appellant was not found with gunpowder residue an his hands, while Humberto Cuellar was (T. 1183-92). The state also admitted that statements placed Lazaro Cuellar with a gun (R. 830).

Tha Death Penalty is submittedly reserved far the worst of First Degree Murders. The instant case, like Terry, is not one deserving of the Ultimate Penalty. The appellant's sentence must be reduced to life imprisonment.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the appellant Respectfully submits, that his Convictions must be Reversed, Sentences Vacated and this Cause Remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 444 Brickell Avenue, 950, Miami, Florida 33130, on this 24 day of March, 1997.

Respectfully submitted,

LAW OFFICES OF
JOHN H. LIPINSKI
1455 N.W. 14 STREET
MIAMI, FLORIDA 33125
(305) 324-6376

Counsel for Appellant

JOHN H. LIPINSKI, ESQUIRE