IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DERRICK CUMMINGS,)

Appellant,)

vs.)

STATE OF FLORIDA,)

Appellee.)

_____)

CASE NO.: 86-413
LOWER CASE NO. : 94-2237-CF

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

REPLY BRIEF OF APPELLANT

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References to the Answer Brief will be "AB" followed by the appropriate page number as assigned by the Appellee.

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ISSUE I:

THE COURT ERRED IN NOT DISMISSING THE INDICTMENT DUE TO PERJURED TESTIMONY GIVEN TO THE GRAND JURY

It is clear even from the argument in the Answer Brief that Marion King lied to Detective Gilbreath concerning his involvement in the alleged murder of Shelton Lucas. In trial, the State indicated that Marion King was a "liar" who was not credible. Specifically, he had lied regarding his involvement in the alleged offense as well as the involvement of Kevin Dixon. This led to the State dropping the charges against Kevin Dixon.

Detective Gilbreath obtained the indictment against the Defendant largely based on King's testimony to him in his investigation. Marion King lied to Detective Gilbreath about who possessed and fired the guns. (T-233) As there were four persons in the car and ballistically only three persons were shooting, Marion King's testimony was material. (Of course, it is not clear that three persons shot as one person could have shot two guns, one after the other.)

The only evidence presented by Marion King regarding Defendant Cummings was that Cummings got into King's car with an uzi and stated that someone appeared to be smoking at the house just before the shooting. No other evidence was presented to the Grand Jury tying Cummings to the crime. The State argues that Marion King's information regarding Defendant was corroborated and therefore reliable. (AB-14) (R-9-10) The corroboration consisted of Shelton Lucas, Sr., stating that he was sitting outside smoking a cigarette (TR 700-02) (AB-14,15), Robison's testimony regarding Defendant with a uzi type gun and finally, it is consistent with the placement of the shell casings. (TR 864-1057, 1178-79) (AB-15)

However, this argument does not prove that Defendant Cummings was involved. There is

nothing to corroborate King's statement that Defendant Cummings said "there he is". Further, there is nothing to corroborate Dap sitting on the porch. In fact, Shelton Lucas, Sr., said he was standing and there was nothing to corroborate a uzi gun except testimony that it was a uzi-type gun when Defendant Cummings was driving much earlier with a man named Levy (TR-770,772).

Other than King's testimony, there was no probable cause to indict Defendant Cummings. He was not seen in the car, he was not put in the possession of a gun by anyone other than Marion King at the time of the shooting and no one corroborated him saying, "there he is let's shoot him" in the slightest. The material statements of King caused the Grand Jury to improperly indict.

Clearly the testimony of Marion King was material, was largely used by Detective Gilbreath in testifying before the Grand Jury and the indictment should be dismissed.

ISSUE II:

THE COURT ERRED IN REFUSING TO EXCUSE THE FOREMAN FROM THE JURY FOR CAUSE

Clearly, Defendant Cummings challenged the juror Mr. Bold for cause. The challenge should have been granted in that Mr. Bold stated that he could not put aside the fact that he had four children under the age of 13 at his own home when sentencing. By stating this, he really was in effect stating that he could not put aside sympathy for the victim or the consideration of his own children. Clearly consideration of his own children would be inappropriate in a sentencing phase. The challenge for cause should have been granted in that there was a basis for reasonable doubt as to the juror's present state of mind. Bryant v. State, 601 So. 2d 529 (Fla. 1992).

The State argues that the issue was not preserved for appeal because after the trial counsel challenged the juror for cause and asked for an additional preemptory challenge, trial counsel neglected to re-identify the challenges for cause but instead asked for an additional preemptor-y challenge for another juror. The State further argues that to preserve this objection for appeal the trial counsel must object for cause, exhaust his preemptory challenges, and request another preemptory challenge specifically identifying the objectionable juror for cause again. Thus, although the trial counsel never waived or withdrew his objection for cause, the argument is that the objection for cause was not sufficient because it was not renewed and a preemptory challenge was not specifically requested for that juror. However, preemptory challenges were requested and denied. It would seem to be an exercise in futility to keep asking for preemptory challenges once they were denied. Since the juror was not excused for cause there was no reason to expect that the juror would have been excused preemptorily or that an extra preemptory challenge would have been granted in

that the Court had already found the juror to be unbiased. In the Trotter case, the defendant failed to object to the juror who was ultimately seated and thus failed to preserve his claim, **Trotter v. State,** 576 So. 2d 691,693 (Fla. 1990). Contrarily, in the instant case, there was an objection for cause to the juror who was seated and a request for an additional challenge which was denied. That the preemptory challenge must be asked specifically for the person who was challenged for cause does not clearly make common sense in that the Court indicated that they were not going to grant any additional preemptory challenges and certainly would not do so for a juror for cause. The issue should be considered preserved and should be reversed for a new trial.

ISSUE III:

THE COURT ERRED IN ALLOWING INTRODUCTION OF PROFANITY BY THE DEFENDANT IN RESPONSE TO BEING ADVISED THAT A BABY WAS KILLED IN THE SHOOTING

Cummings' statements of profanity in response to being told that a child died had no other purpose in this case but to prejudice and inflame the emotions of the jury. While the State argues that it showed a consciousness of guilt of premeditated murder (AB-27), it clearly has little, if any probative value for such. The State argues that Defendant is denying "any part in the killing by professing ignorance about the murder and treating it as a matter of no consequence to him." (AB-27) However, the profanity does not show that in the slightest. It merely indicates that Defendant either did not care that a child had died or that there was nothing at this point that he could do about the fact that a child had died. The incident was over. It does not show that he did not mean to kill anyone, it merely shows that he did not know the consequences of the shooting.

The state further argues that the profanity is an inconsistent statement about his participation in or knowledge of a crime and that it was therefore relevant. (AB-28) However, it is not inconsistent with being present but merely with the consequences of the shooting. The evidence of the solicited alibi was independently relevant. However, the profanity in response to the death of a child has no relevancy whatsoever.

It is not inconsistent with the other evidence that he would not know that the child was shot in that even the medical examiner testified that this was an accidental tumbling bullet that killed the child, Therefore, his response was not inconsistent with the evidence, but was in fact consistent. It

did not, therefore, show any consciousness of guilt. While the statement to the Defendant that the child had died may have been relevant about the death of the child, the profanity in response was irrelevant, inflammatory, highly offensive and prejudicial without any probative value.

The error was not harmless in that it was argued extensively both in the closing arguments and also in the penalty phase. As this was a circumstantial evidence case, the profanity was highly prejudicial and was not harmless in any manner whatsoever. The case should be reversed or a new trial with the profanity excluded.

ISSUE IV:

THE COURT ERRED IN NOT ALLOWING TESTIMONY THAT THE DEFENDANT WAS ADVISED THAT DAP CARRIED A GUN AND WAS KNOWN TO DO SO

The fact that the Defendant armed himself prior to seeking out Dap is relevant to the issue of whether this was a first degree murder requiring premeditation to kill or second degree murder with no premeditation requirement. The difference between first degree murder, Florida Statutes 782.04(1)(a),and second degree murder, Florida Statutes 782.04(2), is the issue of premeditation. Second degree murder requires "...any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual..." The issue of premeditation is therefore crucial to whether or not this was first degree or second degree murder. The State argued that the Defendant armed himself which obviously showing premeditation. But, if in fact the jury was allowed to know that he armed himself because he was advised to do so because the person he was seeking out carried a gun, the entire circumstances of the killing are seen in a different light. It is much more difficult to find premeditation when one arms oneselfbecause one is advised to do so because of the knowledge that the alleged victim is armed. This is particularly crucial in this case where there was no evidence whatsoever of any statement that they were going to seek out and kill the person Additionally, this is a circumstantial evidence case. Further, it is unknown as to who did the actual shooting which killed the alleged victim. The Defendant was denied the right to put on his defense that this was not a premeditated murder by the denial of this evidence.

The case should be remanded for a new trial because he was not allowed to present his theory of the defense.

ISSUE V:

THE COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS BY THE SHOOTING

The aggravating factor of "creating a great risk of death to many persons by (the} shooting" can only be found if the great risk of death is "not a mere possibility, but a likelihood or high probability". Coney v. State, 653 So. 2d 1009, 1015 (Fla.1995). The State indicates that because there were five persons in the home in a residential neighborhood at the prime time television hour of 9:00 p.m. and there were 35 shots from at least three semi-automatic weapons, that there was a great risk of death to many persons. The State mistakenly relies on the case of Suarez v. State, 481 So. 2d 1201 (Fla. 1985). In Suarez, the defendant fired at three police officers in the presence of three co-defendants at a migrant labor camp. In that case, unlike the present case, the court specifically found that although there was "no evidence the police tired their weapons", it was "more an act of providence, in that they were unable to spot the precise location of the defendant's shooting position". Id. It appeared that in the Suarez case the Court was specifically finding a great risk because there was a camp with many people about and the likelihood of a gun battle with the police was great. Additionally, there were seven people involved, not merely five.

The State also relies on the case of Fitznatrick v. State, 437 So. 2d 1072 (Fla. 1983), to indicate that there was great risk. In Fitznatrick, the defendant got into a gun battle with two police officers in the presence of three hostages. The court in that case found a great risk of death to many persons because "the murder occurred during a raging gun battle with the police with three hostages present".

Id., at 1078. Clearly, where there is crossfire between a defendant and police officers in a "raging"

gun battle, there would be a great risk of harm or death. The third case relied upon by the State, Weltv v. State, 402 So. 2d 1159 (Fla. 1981), does not seem to be on point, in that it held that six persons were classified as many persons. Clearly, in this case, we do not have six persons. In sum, in the instant case the great risk of death to many persons is not present either factually or legally. The State did not present evidence beyond a reasonable doubt as to where the other two children were. There was no testimony as to that at all. Further, the shooting largely went into a wall and the persons were separated by walls and partitions. The Florida Supreme Court has held where the other persons were too far away and separated by several walls or out of the line of fire that, there was not a "great risk'. Bello v. State, 547 So. 2d 914, 917 (Fla. 1989); Hallman v. State, 560 So. 2d 223, 225-26 (Fla. 1990) (Behind partitions in a bank and not in the line of fire); Alvin v. State, 548 So. 2d 1112, 1115 (Fla. 1989) (No great risk if not in the line of fire. No great risk where two out of four persons in the vicinity of the shooting were not in the line of fire.) In this instance, there was only a very small area of the wall which could have been penetrated by a bullet. Most of the wall was an impenetrable brick wall. The evidence does not support this aggravating factor.

ISSUE VI:

THE COURT ERRED IN FINDING THE AGGRAVATING FACTOR AND IMPOSING THE DEATH PENALTY FOR COLD, CALCULATED AND PREMEDITATED

The State has failed to show beyond a reasonable doubt that the killing was cold, calculated and premeditated. There are four elements to cold, calculated and premeditated which must be proven beyond a reasonable doubt. 1) Killing was a product of cool and calm reflection; 2) defendant had a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant exhibited heightened premeditation, 4) the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted).

The State argues that the Court correctly found this to be a "search and destroy operation" (AB-35). However, there was no argument that this was the product of a cool and calm reflection and that there was a decision to kill. In fact, if the decision was to kill after cool and calm reflection, then the shooting of bullets into a blank wall does not make sense. Further, there was no evidence that there was any prior intention to kill whatsoever. Merely looking for Dap, finding where he formerly lived and arming oneself does not create a plan to kill or a pre-arranged design. Nor does it qualify as heightened premeditation. Additionally, the Defendant had a reason to arm himself which was that Dap as far as the Defendant knew was always armed. The cold element was not there in that the shooting was an emotional reaction to an injury. See. Cannady v. State, 627 So. 2d 165, 170 (Fla. 1993) (Cold, calculated and premeditated did not apply because it was the result of emotion.) The trial testimony showed that Derrick Cummings was mad when he learned about the incident between Dap and the Co-Defendant. There was no evidence of the state of mind of the persons doing the shooting. Nor does the manner of the shooting itself indicate calm and cool reflection.

Clearly, the heightened premeditation and other elements necessary for the cold, calculated and premeditated aggravating factor were not present. As this item was given great weight the sentencing should be reversed for a new penalty phase hearing.

ISSUE VII:

THE IMPOSITION OF THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CAUSE WITH THE IMPOSITION OF THE DEATH PENALTY IN OTHER CASES

Defendant contends that the death penalty is an inappropriate sentence in this case as it is not proportionate with other death penalty cases. The State argues that the age of the victim should be considered and given great weight even though it was not an aggravating factor at the time of the trial in this cause. By this argument, the State is asking the Court to find the age of the victim as an aggravating factor in the proportionality of the death penalty.

Additionally, the State argues that it is proportional because there are other statutory aggravating factors. It is the position of the Defendant that the other aggravating factors in this cause should be set aside by this Court as argued in other issues. It is significant that death, the final penalty, should be reserved for only the worst of first degree murders. State v. Dickson, 283 So. 2d 1, 7 (Fla. 1973), cert. denied., 416 U.S. 943, 94 Supreme Court, 1950. Clearly, in this case there was not a premeditated killing based on the fact that the killing was accidental from a tumbling bullet. This is not the kind of case that would warrant the death penalty. The evidence frankly does not show that the Defendant purposely and intentionally killed the victim in this cause.

The result of the death penalty in this cause violates due process and would impose cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 1 Sections 9 and 17, of the Florida Constitution.

ISSUE VIII:

THE COURT ERRED IN ADMITTING "VICTIM IMPACT" EVIDENCE AT THE PENALTY PHASE TRIAL WITHOUT LIMITING IT AND GIVING AN INSTRUCTION THAT IT IS NOT TO BE CONSIDERED AS AN AGGRAVATING CIRCUMSTANCE.

The victim impact in this case exceeded what was allowed by Statute and case law. It should not have been allowed at all as there should have been no aggravating circumstances allowed by the Court. Florida Statutes Section 921.141(7), is only designed to demonstrate the victim's uniqueness in the community. In this case, the victim impact included testimony from the victim's grandmother that he had a pet named "birdie"; that he would always ask for hug and chewing gum; and would always share it with his brother and sister. She testified that it was a joy to see his face sparkle and that he was very active. They would pick flowers and wait anxiously for her to put them in a vase. She included testimony that he would tease his grandmother with lizards and that he loved to eat. The testimony included things that he was looking forward to but had never accomplished, such as little league baseball and football; he loved school, was eager to learn and was smart. She testified that the five years of Shelton's life "were years of loving experiences and memories that can never be taken away or replaced". (T-1437, 1439)

His mother testified that the past year had been a "living nightmare" (T-l) and that she has suffered "excruciating headaches, nausea, stomach spasms and other related physical problems". (T-1442) His brother's and sister's grades dropped (T-1442). She read a poem written by the sister. (T1443) Testimony included that the sister had suffered headaches and nose bleeds. The mother

repeated much of the same testimony as the grandmother. In addition, she testified that sleep was not easy and she had to take sleeping pills. (T1444) She also testified that "I can't describe the ache and emptiness that I live with everyday. The pain is deep, the sorrow is real. Often life seems unbearable." (T- 1444)

This testimony goes far beyond the uniqueness of what the statute contemplates for victim impact. Further, although it was requested, the jury was not instructed as to how to use this evidence. Much of it was calculated and designed to plead to the sympathy of the jury. At the very least, the jury should have been instructed that this was not an aggravating factor and they could not consider it as such, nor was it to be considered as a plea to their sympathy. The evidence was used to appeal to the jury's sympathy and emotion which were already high. The case should be reversed for a new hearing on the sentencing phase with the victim impact severely limited. As it stands, the victim impact violates the Defendant's right to a fair trial and due process of law as set forth in Article 1, Section 16 of the Florida Constitution, and the Eighth Amendment of the United States Constitution.

ISSUE lx:

THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING NO CREDIBILITY T O THE NON-STATUTORY MITIGATING FACTORS WHICH WERE APPROVED BY APPELLANT

It is undisputed that no Florida court has defined entry into a home for the purposes of the burglary statute to include a bullet fired from a gun which is outside the building and outside the curtilage. (AB-53) The court relied on the case of State v. Williams, 873 Pacific 2d 471 (OR 1994), People v. Tragni, 449 N.Y.S. 2d (1992), and Whorton's Criminal Law, Section 333 for the proposition that entry may be effected by shooting a bullet. (R-292) The Oregon case relied on Whorton's Criminal Law, Section 333 (14th Edition 1980). Significantly, Whorton's in stating the broad black letter law rule for entry being effected by the shooting of a bullet relied on a case out of Texas, Holland v. State, 55 Tex. at 27, 115 S.W. 48 (1908). This is an inappropriate reliance because Texas in its penal code specifically defines shooting into a house as burglary. Tex. Penal Code Annotated S. 30.02. Therefore, Whorton's which relies on the Texas case cannot be relied upon because Texas specifically provides for the questioned factual scenario. Other commentators have held that the authorities are uncertain. See. 2 Russell on Crimes and Misdemeanors. 1072-73 (7th Ed. 1910). Since the statute should be strictly construed in favor of the accused, it would be inappropriate to expand burglary to include entry by shooting a gun while off the curtilage. Florida Statutes, Section 775.021(1). It would appear that in this case the court should only apply a narrow construction of entry. Entry could either be effected by actually entering part of the body as the Florida Supreme Court jury instructions hold or entry of an instrument that is held in the hand or connected to the body. Anything other than this construction violates the prohibition against vagueness. See. State v. Hamilton, 660 So. 2d 1038 (Fla. 1995). This should be remanded and

reversed for a new penalty phase hearing.

ISSUE x:

THE COURT ERRED IN FINDING IN SENTENCING THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED OR WAS AN ACCOMPLICE IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT A BURGLARY . . . . . .

Trial counsel in closing argument (as admitted by Appellee) (AB-43), identified for the Court the non-statutory mitigating factors. The Court was duty bound to consider them and failed to do so. It is reversible error not to at least consider non-statutory factors.

Contrary to the argument of the State, the Defendant was abused by his mother even after they resided with his grandmother. While his grandmother attempted to provide the "loving and nurturing home" that the State argues, she unfortunately had to work long hours and was unable to be present.

Besides having to quit school due to a motorcycle accident, Cummings was also supposed to be in special classes. His helping his neighbor was remarkable and his becoming a role model to other disadvantaged youths is noteworthy.

As the Defendant submits that there should have been no statutory aggravating circumstances found by the Court, the Court erred in not considering the non-statutory mitigating circumstances.

ISSUE XI:

THE COURT ERRED IN NOT GRANTING A JUDGMENT OF ACQUITTAL

The State argues that the presumption of correctness should prevail in the issue of whether there was sufficient evidence to overcome a motion for judgment of acquittal. (AB-58) The evidence does not show that there was a premeditated design to kill as indicated in the Initial Brief

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable results which flow from it insofar as the life of his victim is concerned. (Cites omitted) Larry v. State, 104 So. 2d 352,354 (Fla. 1958).

In the instant case, there was provocation but not between Cummings and the alleged victim, but between a Co-Defendant and Dap. There were previous difficulties between those two people, not including the Defendant. The manner in which this homicide was committed was almost accidental in that the bullet that killed the victim was a tumbling bullet (similar to a ricochet bullet). No one was in view or within close range of the shooting. The nature and manner of the wounds inflicted were from an accidental bullet. Clearly, the Defendant would not be "conscious" of any killing or that his actions in shooting would probably bring about a killing of this alleged victim. The State has not excluded every hypothesis of innocence which is that Defendant did not do the actual shooting, nor that Defendant had any premeditation. The judgment of acquittal should have been granted and should be reversed and remanded for a new trial.

CONCLUSION

The trial court erred in not allowing the defendant to present evidence to refute premeditation and by allowing the State to introduce evidence slurring the Defendant's character. The case should be reversed. In addition, the indictment should have been dismissed.

Further, the sentencing should be reversed as Mr. Bold could not be fair and should have been excused for cause. The sentencing hearing was extremely unfair because of the victim impact being introduced with no limiting instructions by the Court. Also, the aggravating factors found by the Court were predicated on insufficient evidence. Finally, the imposition of the death penalty is not proportional in this case and the case should be remanded for the imposition of a life sentence.

Respectfully submitted,

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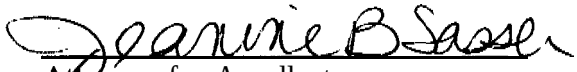

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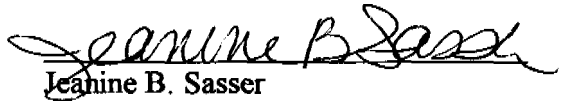
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301; and to Curtis M. French, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, by regular United States Mail this 28th day of April, 1997.



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