IN THE SUPREME COURT OF FLORIDA

ANDRE FISHER,

Appellant,

v. CASE NO. 86,665

STATE OF FLORIDA,

Appellee.

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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REPLY BRIEF OF APPELLANT

ARGUMENT

Point I

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT FISHER'S CONVICTION FOR PREMEDITATED MURDER.

The question is what was Fisher' intent when the barrage of bullets were fired into the Lucas's carport?

Appellant has argued the attack on the Lucas house showed at most reckless indifference to human life, or second-degree murder.

In response, the state contends the evidence proved Fisher was a "party to the crime of premeditated murder," a crime committed "at his behest and for his benefit." State's Answer Brief at 10. This was premeditated murder, asserts the state, because Fisher had the most reason to seek vengence and therefore

instigated the attack; Fisher spotted someone who looked like Dap sitting in the carport; that person was visible through the doorway; and when the shots were fired into the carport, whether or not he was one of the shooters, Fisher intended for those bullets to kill Dap. State's Answer Brief at 10, 16, 19.

The state has built a house of cards.

There was no evidence Fisher instigated the attack. The most that can be said is that Fisher may have instigated the attack. Derrick Cummings also may have instigated the attack. After all, Cummings went searching for Dap as soon as he heard about the altercation, before he even saw Fisher.

There also was no evidence anyone in the Honda saw Mr. Lucas or that Lucas would have been visible to them. Mr. Lucas testified he did not know if he could have been seen. It was nighttime. The carport was dark. Mr. Lucas was standing on a step behind Dap's car, Bushes and trees obscured Lucas's view of the street and approaching Honda, which was coming down Dostie as Lucas went back inside. Lucas had closed the door, walked through the kitchen, and was halfway across the living room when the shots were fired. The state presented no evidence to contradict the reasonable possibility that the men in the Honda saw Dap's car but not Mr. Lucas,

The evidence in this case left many unanswered questions. All we know is that four men in a Honda went looking for Dap to retaliate for Dap's assault on Fisher. The four men found a house with Dap's car parked in the carport. Three guns fired a total of 35 bullets into the carport, hitting Dap's car, the kitchen door, and the brick **wall.** Three people were in the living room when the shots were fired, one of whom was hit. One of the other people in the living room, who resembled Dap, was out in the carport just before the shooting.

We do not know what was planned, if anything. We do not know who instigated the search for Dap. We do not know if anyone saw Mr. Lucas in the carport. We do not know if Mr. Lucas was visible. We do not know if the shooters fired at Dap's car, or at the kitchen door through which Mr. Lucas had just entered, or just fired randomly into the carport. We do not know if any of the shooters consciously considered the consequences of their actions. We do not know if Fisher **was** a shooter. If Fisher was not a shooter, we do not know if he knew what the others intended or assisted them in any way

In short, there was no evidence Fisher intended the shooting or its tragic consequences.

The state asserts any theory Fisher **was** an "innocent bystander" is unreasonable. Answer Brief at 18. But Fisher has never characterized his role as that of an innocent bystander Fisher has asserted only that he did not commit murder. The evidence shows Fisher intended, or was willing, to retaliate against Dap. The evidence does not show, however, what sort of retaliatory action he was willing to engage in. Perhaps he was willing to commit a crime. But,

> [a]l willingness, indeed an eagerness, to fight does not necessarily equal a willingness to kill. Hard feelings against **a** person shared by two brothers may incite one to shoot but not necessarily incite the other to help him. Concerted action in a fist fight does not necessarily produce concerted action to kill.

Chaudoin v. State, 362 So. 2d 398, 402 (Fla. 2d DCA 1978).

That Fisher was willing to retaliate does not mean he intended or participated in the criminal act that actually occurred. Because there was no evidence Fisher intended or participated in the criminal act that actually occurred, his conviction cannot stand.

Furthermore, what actually occurred was an "attack on the house where Dap stayed," see State's Answer Brief at 14, not premeditated murder. Even if the jury were entitled to find

Fisher was a principal to the shooting, the circumstances of the shooting show, at most, reckless indifference to human life, or second-degree murder, not that Fisher had a fully formed conscious intent to kill. See Initial Brief at 23-29.

Point 2

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AGGRAVATING CIRCUMSTANCES (A) THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER; (B) FISHER KNOWINGLY CREATED A GREAT RISK OF HARM TO MANY PERSONS; (C) THE HOMICIDE WAS COMMITTED DURING A BURGLARY,

B. Great Risk of Harm To Many Persons

The state has given no record citation for its assertion that there were five persons in the house when the shooting occurred. Appellant has found nothing in the record indicating whether the other two Lucas children were at the house that evening.

C. **Burglary**

The state has responded that under appellant's interpretation of the burglary statute, entry by instrument would have to be by some instrument specifically approved by a court in order to constitute a burglarious entry. Answer Br. at 31 n.10. To the contrary, appellant's position is that the instrument must

be held in the hand or otherwise attached to the individual perpetrating the burglary. Initial Br. at 42.

Appellant discussed the due process problems with the state's interpretation of the burglary statute in his Initial Brief. That is, how could an ordinary person know shooting into a structure is a burglary, when no Florida court has held that it is; only one American court has even addressed the issue; and English common law authorities are, at best, ambiguous. Appellant also points out here that the only American case that has held entry of a bullet constitutes a burglary was decided after the instant offense occurred. See Williams v. State, 127 Ore. App. 574, 873 P.2d 471 (April 27, 1994), review denied, 319 Ore. 274, 877 P.2d 1203 (1994). Accordingly, this case can hardly have constituted "fair warning . . . of what the law intends" to appellant. McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931).

Appellant also pointed out in his Initial Brief that under the state's interpretation of the statute, throwing an egg at someone standing in a yard would be a burglary. Indeed, throwing anything into a building or yard[1] with the intent to commit any

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[1] In Florida, the common law dwelling requirement has been expanded to include any building and the grounds around it.

offense (such as criminal mischief, assault, battery) would be a burglary. The legislature cannot be presumed to have intended such absurd results.

Point 3

THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE THERE EXISTS A SINGLE AGGRAVATOR; THE EVIDENCE WAS INSUFFICIENT TO SHOW FISHER KILLED, ATTEMPTED TO KILL, OR INTENDED TO KILL; AND AN EQUALLY CULPABLE CODEFENDANT DID NOT RECEIVE THE DEATH PENALTY.

The state has asked this Court to consider as an aggravating factor that the victim in this case was a child, even though this was not an aggravator at the time of the crime or trial. Answer Br. at 37-38. This Court cannot consider aggravators not presented, argued, or found by the trial court, even if the record supports the aggravator. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Furthermore, even if the Court could properly consider an aggravator not presented or found by the trial court, there would be significant constitutional problems with aggravating a murder solely because the victim was a child, where, as here, the child's death was unintended.

None of the cases the state has cited to support death as a proportionate penalty for Fisher, see State's Answer Brief at 39,

is comparable to the present case, either in number and nature of aggravation and mitigation, or the circumstances of the crime.

CONCLUSION

Appellant respectfully asks this Honorable Court to grant the relief requested in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis French, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, ANDRE FISHER, #121959, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 29th day of July, 1997.

NADA M. CAREY