IN THE SUPREME COURT OF FLORIDA

GARY RAY BOWLES,

Appellant,

v. CASE NO. 89,261

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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ISSUE I

THE COURT ERRED IN ALLOWING THE STATE TO MAKE REPEATED REFERENCES TO AND INTRODUCE EVIDENCE OF THE VICTIM'S HOMOSEXUALITY AND THE DEFENDANT'S HUSTLING OF GAY MEN WHEN SUCH COMMENTS AND EVIDENCE HAD NO RELEVANCE TO THE PROPER DETERMINATION OF THE SENTENCE THE JURY HAD TO RECOMMEND, A VIOLATION OF BOWLES' FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

As Bowles said in opening this issue in his Initial Brief, "The theme that runs through the State's case focussed not so much on the aggravating and mitigating circumstances articulated in section 921.141, Fla. Stats (1995), but in Mr. Hinton's sexual orientation, and Bowles' "hustling" of homosexuals." (Initial Brief at p. 11.) That remains the case. At trial, the State converted the legal equivalent of "Twinkle, Twinkle Little Star" -- that Bowles had said eleven years earlier that he hated gays because his girl friend had aborted his unborn child -- into Tchaikovsky's 1812 Overture. From its opening statement to its closing argument and to its sentencing memorandum, it has persisted in arguing that "[Hinton] died because he was homosexual." (11 T 1263). The only evidence it has to support that position comes from that decade old statement.[1] Unlike the cases the State cites in its brief

[1] On page 17 of its brief, the State says that "without objection" Officer Collins testified "that Bowles had made the statement that he felt that homosexual had ruined his life with women and were responsible for the loss of his unborn child." Well, not quite.

Before Collins took the stand, Bowles' counsel objected, on grounds of hearsay and relevancy (9 R 984, 989), to conversations the policeman had with the Defendant regarding what he said to Mary Long and Mary Beth Pearson. Specifically, "they -- meaning gays -- killed my baby." (9 R 982). The court, rather than ruling then, prudently requested a proffer (9 R 989), after which it excluded the testimony regarding Mary Long, but admitted what the Defendant said regarding

on page 23-24, there is no logical or temporal proximity between it and Bowles' murder of Hinton. Alvord v. State, 307 So.2d 433, 436-37 (Fla. 1975)(Defendant tries to sodomize teenage girl immediately before her murder.); Michael v. State, 437 So.2d 138, 141-42 (Fla. 1983)(Michael's professed sexual desires for another inmate relevant to show why he confessed to the latter.); Washington v. State, 362 So.2d 658, 660-61 (Fla. 1978)(victim's/ minister's homosexuality prompts his death because it offended the Defendant's notions of what a minister should do.); Toole v. State, 479 so. 731, 732-33 (Fla. 1985)(Defendant's and Victim's homosexual relationship provides a motive for the subsequent murder.); State v. Statewright, 300 So.2d 674, 678 (Fla. 1974)(Defendant's homosexual acts five years before the murder becomes a motive because the Defendant was afraid the victim would reveal his homosexuality.) This is more than simply a weight argument. The State elevated that isolated statement into the dominant theme for its penalty phase case for death.

In Hitchcock v. State, 673 So.2d 859 (Fla. 1996), the state asked the victim's sister on direct examination about the sexual abuse the Defendant had inflicted on her. It pursued that evidence when it cross-examined his expert on Hitchcock's history of sexual abuse and his being classified as a pedophile. Finding this inquiry so prejudicial that another sentencing hearing was required this Court concluded that "evidence of a defendant's criminal history, which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being admitted for some other purpose" is inadmissible. Id. at 861. It reached that result by relying on its opinion in Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992):

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hating homosexuals (9 R 1031). On appeal, Bowles has a hard time understanding what else he could have done to preserve this issue for appeal. He certainly met every requirement this Court has prescribed for preserving issues. Castor v. State, 365 So. 2d 701 (Fla. 1978). He raised a timely objection, and the court was fully aware of the problems Collins' hearsay presented.

> This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Except through the imagination of the State, we have no link between Hinton's murder and Bowles' statements as there is in the cases cited by the State in its Answer Brief. There is no other evidence providing a homosexual motive for the murder. Yet, relying on this dated statement, the State weaves an entire theory, transforming a murder done during a drunken spree into one coldly committed in furtherance of a vague and unverified statement made eleven years earlier. The trial judge did not buy it, but the jury might have.

Bowles raised the homosexual issue, but he never made it the dominant, indeed any theme of his defense. For him, Hinton's homosexuality and his "hustling" of gays were part of the case. But then Hinton and Bowles both had arms and legs. Those facts just were unimportant.

For the state, however, Bowles' antipathy to homosexuals explained the murder. In opening its case, the prosecutor said, "Mr Hinton was a homosexual. And the defendant didn't like homosexuals." (8 R 802-803) In closing, he continued, "And I would submit to you that he died because he was a homosexual." (11 R 1263). Thus, the State is correct when it claims on page 24 of its brief that "the prosecution in this case did not set out to indiscriminately besmirch Bowles' character or titillate the jury with such maters as the victim's sexual preferences and/or Bowles' relationship with homosexuals." It did so deliberately.

Moreover, contrary to the State's assertion on page 24 of its brief that Bowles' counsel "recognized the relevancy of this evidence, as demonstrated by his failure to object." Bowles' lawyer repeatedly objected to the State's homosexuality

allusions. He objected at the State's opening statement in which the prosecutor said "Mr. Hinton was a homosexual. And the defendant didn't like homosexuals." He objected to the testimony that Bowles' had said eleven years earlier that he hated homosexuals. (9 R 984, 989). He objected to Timothy Daly telling the jury that Bowles admitted "rolling faggots" in Daytona (9 T 1046). On the crucial evidence that he now complains about, Bowles objected to its admissibility at trial. Because he also inquired about Hinton's sexual preferences and mentioned it does not mean he thereby waived any objection to the State's evidence that he hated homosexuals.

Thus, contrary to the State's argument on page 13 of its brief, Bowles' trial and appellate counsel do not "have diametrically opposing views as to the admissibility of this type of evidence." Homosexuality became a part of this case because Bowles had sold his body to men since he was a teenager. Homosexuals were the ones he did business with, and that connection explained in part perhaps how he linked up with Hinton. Thus, he met gays in bars (8 R 759-60), and hustled them to stay alive (9 R 1019-20). Counsel questioned prospective jurors about homosexual acts (8 R 758), and he asked a witness if Hinton was homosexual. Such inquiries explain his lifestyle; they do not provide a motive why he killed the man. That Bowles had "previously been a 'hustler' is not one of his complaints, as the State alleges its brief on pages 24-25 of its brief. It is the State's dogged determination to paint him as a hater of gays, to turn this murder into a hate crime, when there is no evidence to show that he killed Hinton specifically for that reason. That is the problem counsel had at trial, and it is the one he presents to this court on appeal.

This effort does not "diametrically oppose" the State's intention to show Bowles as a rabid homophobe. Based solely on the eleven year old statement the Defendant had made regarding gays in general, the Prosecutor concluded that distant proclamation was the specific reason he killed Hinton.

It must bear repeating that even though Bowles probed his and Hinton's sexual proclivities, he never, no not once, made any inquiry or opened the door to the State introducing evidence of his vague and unverified hatred of homosexuals. That is an important point because it is the key to this issue, and rather than blurring the homosexual aspect of this case as the State has done (See the paragraph and quote on page 18, and the first sentence on page 19 of the Answer brief, for example.), this court must keep sharply in mind that Bowles at trial, and on appeal, has separated the Defendant's association with gays in particular from any supposed general hatred of gays he may have expressed over a decade earlier in a far different context. When the issue of Bowles' alleged antipathy came up, counsel vigorously objected (9 R 984, 989). When it dealt with his or Hinton's lifestyle he did not complain. Bowles has preserved the issue he raised at trial for appeal, and appellate counsel is arguing that the State's relentless efforts to portray him as a hater of gays was improper, and shifted the focus of the sentencing trial from a search for aggravation and mitigation, to a debate on hate crimes.

On page 20, the State says, "the only objections interposed below were raised in regard to the prosecutor's opening statement and the testimony of witness Daly." Not so. He vigorously objected to the Officer Collins' testimony regarding what Bowles said about hating gays (9 R 984, 989). Regarding the opening statement complaint, defense counsel said more than it "was his belief that a motion in limine was then pending." (8 R 802-804) Besides saying that, he also argued "the State is attempting in opening statement to get in evidence that deals with matters outside the scope of the evidence in this case and irrelevant and prejudicial." (8 R 802)

The State also says Bowles made no contemporaneous objection to the "gay hating" testimony (Appellee's Brief at p. 20), but that clearly is incorrect (9 R 981-84, 989).

On pages 20-21 of its brief, the State "somewhat" questions whether Bowles has preserved the objection to Daly's "rolling faggots" statement because counsel did not ask for a mistrial following his request for a curative instruction. When defense counsel first objected, he asked for a mistrial. The court agreed that Daly's statement regarding Bowles "rolling fagots" in Daytona was improper, but he apparently did not believe the comment was sufficient to warrant to grant a mistrial because he told counsel, "Let's proceed." Only then did the defense lawyers ask for a curative instruction. Counsel was obviously trying to minimize the damage created by the State's witness, and had he had his wishes, the court would have granted the mistrial. Bowles has preserved the issue for appeal.

On page 21 of its brief, the State claims "Under all of the circumstances of this case, reversible error has not been demonstrated." In light of the State's "hate crime" focus, Daly's talk of Bowles' "rolling fagots" in Daytona and FBI agent Regan's claim that the Defendant said he "drank to make it easier to kill" (Issue II), it has.

Also, on page 21 of its brief, the State implies that the only problem presented by this issue came from Daly's claim that Bowles was "rolling" homosexuals, and the court promptly recognized the error, and sustained the Defendant's objection and gave a curative instruction. If that had been the only problem presented, perhaps the State would be correct. But, the Appellee has had to reach into Issue II of the Initial Brief to make that claim because it has ignored the thrust of its case below and what Bowles has focussed on in <u>this</u> issue: that the State, rather than arguing the aggravating factors provided by statute, chose to exalt the essentially irrelevant homosexual aspect of this crime into a non-statutory justification for death and transform this case into a referendum on hate-crimes. To make that change, the State on appeal has had to ignore what it said below in its opening statement (11 T 1263), its closing argument (8 T 802-804), and its questions to its witnesses (9 T

1032-33, 1037-1038, 1046, 1067-1068, 1078, 1100-1101). It has had to overlook Bowles' efforts to keep that theme from the jury's consideration (2 R 340). Contrary to what the State contends, the State repeatedly emphasized that "Hinton was a homosexual. And the defendant didn't like homosexuals" (8 T 802-804). "And I would submit to you that he died because he was homosexual." (11 T 1263)[2]

On page 22 of its brief the State, quoting this court's opinion in Wike v. State, 22 Fla. L. Weekly S484, 484 (Fla. July 17, 1997), claims that any evidence relevant to the nature of the crime and the character of the Defendant is admissible. While true, that ignores this court's limiting of relevant evidence to that which aggravates a murder as statutorily defined. Unless what the State offers tends to support one of those aggravators, it is irrelevant. State v. Dixon, 283 So.2d 1 (Fla. 1973). For example, the age of the victim, until recently, while relevant to the nature of the crime, had no relevancy in the death sentencing equation. Section 921.141(5)(l), Fla. Stats. (1995). Similarly, that the Defendant may have been on community control at the time he committed a murder was irrelevant to whether he should live or die. Trotter v. State, 576 So.2d 691 (Fla. 1990). Section 921.141(5), Fla. Stats. (1996), thus has restricted the scope of relevancy as defined in Sections 90.401. Or, rather, it is one of the exceptions provided for in Section 90.402 Fla. Stats (1996)("All relevant evidence is admissible, except as provided by law.").

In addition, in Wike, this court found: "In this case, it would have been impossible to present the victim's murder in a vacuum given the circumstances of the contemporaneous crimes committed against both the victim and her sister. We find

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[2] The State notes on page that Bowles did not object to the closing argument. How could he? The court had admitted the evidence that eleven years earlier Bowles had expressed a dislike for homosexuals in general, which formed the basis for the State's closing argument. In the context of that court ruling he had no basis for complaining. It would have been as "useless gesture" to have done so.

no error in the admission of the testimony regarding the victim's sister." That was untrue here. See, Demps v. State, 395 So.2d (Fla. 1981)(No error in characterizing State witness/prison inmate and another inmate, who were homosexual lovers, as "real good friends.") See, also, Hitchcock v. State, 673 So. 859 (Fla. 1996).

Bowles has preserved this issue for appeal, and the State has said nothing to ameliorate the magnitude of the court's error. This court should reverse for a new sentencing hearing.

ISSUE II

THE COURT ERRED IN DENYING BOWLES' MOTION FOR A MISTRIAL AFTER STATE WITNESSES TESTIFIED THAT THE DEFENDANT WAS "ROLLING FAGOTS" WHEN HE LIVED IN DAYTONA BEACH, AND "HE DRANK TO MAKE IT EASIER TO KILL," A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State has made two points meriting a reply: 1. The comment that Bowles "drank to make it easier to kill" was an isolated statement never referred to again (Appellee's Brief at p. 26), and 2. The judge found the Defendant's intoxication as mitigation. (Appellee's Brief at p. 27).

As to the first point, the remark is "isolated" only because the State treated it as such. Woven with that comment was the prosecution's homosexual hate-crime theme and the improper testimony that Bowles "rolled fagots" in Daytona. By itself maybe the testimony that he "drank to make it easier to kill" arguably had no fatally prejudicial impact, but when considered as part of the totality of the State's unfair character attack and focus on nonstatutory aggravation, that is an untenable position.

Moreover, there are some comments that are so prejudicial that no matter how isolated the testimony, no matter how strong the curative instruction, only a retrial will remove the prejudicial stain. In Jackson v. State, 451 So.2d 458 (Fla. 1984), a capital case involving a double homicide, a state witness claimed Jackson had said he was "a thorough bred killer from Detroit." This court held that isolated comment had no relevance to any issue and "suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice." Id. at 461.

As to the second point, that the judge considered Bowles' intoxication as mitigation, the State has ignored that the jury is a "co-sentencer," and, as such, it may have used his confession differently. Rather than mitigate a death sentence, the

jury may have concluded, as the State does in its brief on page 27, that "such would undoubtedly be relevant to the CCP aggravator. . . ." Yet, as the State also noted, this "aggravating circumstance was not ultimately found" by the trial judge. Hence, plenty of "reasonable jurors" would have read this remark as relating to additional crimes on Bowles' behalf." (Appellee's Brief at p. 27). Indeed, that is the only reasonable conclusion they could have reached.[3] They may have found the CCP aggravator and ultimately recommended death based on that comment, even though it would have erred to have so concluded. Cf., Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed. 371 (1991)(A jury is likely to disregard a bad instruction where it is unsupported by any evidence.).

The court's failure to grant Bowles' repeated requests for a mistrial was not only error, it was reversible error. (Initial Brief at pp. 25-26.) Whether considered by itself or as part of the overall state strategy of making this a hate-crime expose, the error of portraying Bowles as a serial killer was error. This court should reverse the trial court's sentence and remand for a new sentencing hearing.

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[3] The State notes on page 26 of its brief that "This matter was never referred to again in closing argument. . ." While that may be true, the jury may have been in such shock after hearing it that the State need never have referred to it again. Some allegations have such damning effect that apologies and efforts to ameliorate the damage have no impact. Errors like the one here are so inherently prejudicial that only a retrial can correct the problem. Finklea v. State, 471 So.2d 596, 597 (Fla. 1st DCA 1985).

ISSUE III

THE COURT ERRED IN FAILING TO FIND THE TWO STATUTORY MENTAL MITIGATING FACTORS APPLIED IN THIS CASE, A VIOLATION OF BOWLES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Before we get too excited about the State's argument on this issue, we need to recall what Bowles raised. He complains that the court erred in failing to find the two statutory mental mitigators. The law is simple: if he presented evidence to support finding them, the court had no discretion but to do so. That it may have given them little weight, or found Bowles' intoxication or other facts as non statutory mitigation does not alter the conclusion that it should have also found the statutory mental mitigators. This is particularly true considering the special importance the legislature has given to the latter. Stewart v. State, 558 So.2d 416, 421-22 (Fla. 1990)(Grimes, dissenting.)

Rather than facing those simple truths, the State claims no error occurred because, despite the court's sentencing order to the contrary, there is scant evidence of Bowles' intoxication. (Appellee's Brief at pp. 32-33, and the court found his intoxication as non-statutory mitigation.)

First, on the day of the murder, Hinton, a man he had brought home named Rick, and Bowles smoked marijuana and drank beer (10 T 1080, 1132-33). They partied until about 8 p.m. at which time Rick had to catch a train. The trio went to the station, and while waiting in its parking lot they continued to drink beer and smoke the drug (10 T 1080, 1132). By this time Bowles was very drunk (10 T 1133). After returning home, Hinton went to sleep, but Bowles continued to drink beer, consuming as many as six "quart Magnum beers." (9 T 1017, 10 T 1080)

Before the Defendant had drunk the final six quarts of beer, Rick said, as the State notes in its brief, he was "coherent." (10 T 1133). But this is what he also related:

Q. And was the 12-pack completely consumed?

A. Yes, sir.

Q. Do you know how much you had?

A. Probably around six.

Q. And Mr. Bowles?

A. Probably six.

Q. Approximately what time did you leave Mr. Hinton and Mr. Bowles in order to catch the train?

A. About 7:45.

Q. And when you left where was Mr. Bowles?

A. Laying on the back seat.

Q. And was he intoxicated at that time?

A. Yes, sir.

Q. And if you had to put him on a scale of one to ten, where would he be?

A. Around a ten.

Q. Ten would be absolutely gone?

A. Well, he was still coherent. I mean, he talked to me. He said, "I'll see you next time I come back to down."

Q. But he was drunk?

A. Right.

(10 T 1133-34)

Bowles was very drunk.

The State, on pages 32-33 of its brief claims that because Bowles engaged in "purposeful conduct" the court correctly rejected finding this aggravating factor. Yet, if that were the standard for finding either of the statutory mitigators, this court would not have concluded they applied in Nibert v. State, 574 So.2d 1059 (Fla.

1990); Morgan v. State, 639 So.2d 6 (Fla. 1994); or Knowles v. State, 632 So.2d 62 (Fla. 1993). Impaired judgment is a sign of alcohol intoxication. An inability to do "purposeful conduct" is not-as the legions of persons who annually drive while intoxicated can testify. Diagnostic and Statistical Manual of Mental Disorders IV, Section 303.00 Alcohol-Induced Disorders (Washington, D.C., American Psychiatric Association: 1994). Moreover, that Bowles could remember what happened that night does not mean he was sober. Contrary to the State's contention on pages 33-34, the evidence clearly shows Bowles was drunk, and there is no evidence that he was not.

The State cites three cases at the end of its argument on this issue to support its position. Johnson v. State, 608 So. 4, 13 (Fla. 1992); Preston v. State, 607 So.2d 404, 411-12 (Fla. 1992); and Banks v. State, 22 Fla. L. Weekly S 521, 522-23 (Fla. August 28, 1997). Those cases are distinguishable from the facts presented here in several important respects:

1. In Johnson and Banks, the Defendants murdered three (Johnson) or two (Banks) people.

2. Other than the Defendant's testimony, there was little evidence he had taken drugs. Preston.

3. The beer drinking or drug taking happened hours before the murders, so their effects may have been reduced. Johnson, Preston, Banks. In Johnson, the Defendant murdered, robbed and terrorized a community from the evening of one night to the late morning hours of the next day. In Banks, after playing and winning pool for several hours, Banks snuck into his wife's trailer, murdered her as she slept, then brutally raped his 10 year old stepdaughter for 20 minutes before killing her. In Preston, the Defendant told his brother he had planned a robbery, and after doing so he took the victim to another location, forced her from her car, had her disrobe, and then shot her.

In contrast, virtually no time elapsed between Bowles' beer party and the murder. After drinking beer (at least six by Rick's count (10 T 1033)) and smoking marijuana with Hinton and Rick, Bowles and the victim returned home. Hinton went to sleep, but Bowles continued to drink at least six more quarts of beer. During this final beer binge he killed Hinton, not hours later as in Johnson and Banks. Moreover, unlike Preston, we have direct testimony, other than the Defendant's own statements, that Bowles was not only drunk, but a "ten."

Also, distinguishing this case from Preston, Bowles never said he killed Hinton because he needed money, and as argued in Issue IV, the evidence points with an indifferent finger that he murdered the victim for any financial gain.[4] Finally, unlike Johnson and Banks, Bowles killed only one person.

On the other hand, the cases Bowles relied on in his Initial Brief bear closer resemblance to Bowles' case. In Nibert, Knowles, and Morgan, the connection between the drinking and the murders was much closer. The evidence of the use of drugs, alcohol, and other intoxicants was unrefuted, either from an historical perspective or immediately before the killings. Nibert, at 1062-1063, Knowles at 67, and Morgan at 14. Whatever other crimes the Defendants committed during the homicides became an ancillary byproduct. Knowles (robbery). No real motive for the murders ever emerged, and the crimes seemed to be impulsive, spur of the moment acts. In each of those cases, this court said the two statutory mental mitigators applied.

The facts presented by this case fit closer to the Nibert, Knowles, and Morgan trilogy than those presented by the State in its brief. Bowles has an unrefuted life time addiction to alcohol, and in the minutes before the murder he was

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[4] Also unlike Preston, the State never pressed the robbery allegation against Bowles, but eventually dropped the charge (6 R 1015).

undeniably drunk. Likewise, "something snapped" inside him, and we have no clear reason why he killed Hinton. He acted on impulse, and there is no evidence he coldly plotted Hinton's murder to make taking his property any easier. As in the earlier cases, the two statutory mental mitigators apply, and the trial court erred in refusing to find them.

This court should reverse its sentence and remand for a new sentencing hearing.

ISSUE IV

THE COURT ERRED IN FINDING BOWLES COMMITTED THE MURDER DURING THE COURSE OF AN ATTEMPTED ROBBERY AND FOR PECUNIARY GAIN, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the end of the State's argument on this issue it cites some cases to support its argument. They do not. In Porter v. State, 429 So.2d 293, 296 (Fla. 1983), Porter had committed a string of burglaries, and he told a former roommate that he intended to continue breaking into houses. He particularly wanted to steal a car, and if necessary he would leave no witnesses. He later broke into the victims' house, killed the victims, and stole several things including a television set and a car. Even though he later threw away much of what he had taken, that did not negate his earlier, announced plan to kill so he could steal what he wanted.

In Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994), Wyatt and Lovette escaped from a North Carolina road prison and fled to Florida where they went on a crime spree. They met a girl at a bar in Tampa. The Defendant left the bar with the car but returned a short while later. The two men fled, driving the victim's car, which they abandoned a few days later. Pecuniary gain was properly found. The two men had escaped from prison, and had a need for transportation. That they abandoned the car never refuted the claim that at the time of the murder they killed the victim to get her car. Indeed, it would seem that Wyatt befriended the girl simply to learn if she had a vehicle, and once he knew that he killed her.

In Shellito v. State, 22 Fla. L. Weekly S554, 556 (Fla. September 11, 1997) Michael Shellito stole a gun, and about six hours later he told his girl friend to let him out of her car because he had "to do some work to make money." A short time later he "shook down" the victim, demanded money, and after learning he had none, shot him. When found, the former had one of his pants pockets turned out. Clearly Shellito started his criminal escapade to get money, and that he failed to achieve that

objective cannot deny his intent. That is what the pecuniary gain aggravator punishes, not the success.

Unlike Porter and Shellito, Bowles never told anyone before he committed his murder that he needed a car or had some work to do to make money. Unlike Wyatt he had no obvious, evident need for transportation, and unlike the former he never struck up a friendship with the victim only to achieve that goal. Bowles lived with Hinton for several weeks before killing him, evidence that he probably had no similar intent as Wyatt to kill to steal a car. Unlike Shellito's, Wyatt's and Porter's guns, his murder weapon one was one of convenience, a forty-pound rock found outside the trailer. Unlike Shellito, Wyatt, and Porter, Bowles was drunk. Those cases have no controlling relevance to this one because those Defendants' needs and expressed desires for money or things clearly signaled their intentions. The pecuniary gain aggravator permeated the facts of those cases.

Here, the evidence is less compelling that Bowles killed Hinton to steal from him. First, the state never charged Bowles with theft of the car or money, or any of the other things it would argue became the basis for the pecuniary gain aggravator. It even dropped the robbery charge it had filed against him (6 R 1015). Second, the trial court rejected the cold, calculated, and premeditated aggravating factor, further evidence that Bowles gave scant thought for his "need" to kill Hinton. Indeed, from the evidence, the more reasonable hypothesis arises that the Defendant's beer and marijuana soaked brain gave scant thought to anything. Instead, "something snapped," and the thefts occurred because Hinton was dead, not as the motive for the homicide. Stealing the car and other property arose as incidents to the underlying murder and do not define it as the takings in Wyatt, Porter, and Shellito did.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE V

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER, A VIOLATION OF BOWLES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Bowles has given the facts in the light most favorable to not finding this aggravator. The State has presented them so as to convince this court that the lower court correctly found the especially heinous, atrocious, or cruel aggravator. Who is right? It is difficult to say. Because there is so much ambiguity concerning the manner in which Hinton died, this court should simply find the State never established its case for it.

This court should, therefore, reverse the trial court's finding on this aggravator and remand for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN FAILING TO CONSIDER AND INSTRUCTING THE JURY THAT THEY COULD CONSIDER EVIDENCE OF THE DEFENDANT'S DEFECTIVE MENTAL CONDITION WHEN HE COMMITTED A MURDER TO DIMINISH THE WEIGHT IT GIVES TO THE AGGRAVATING FACTOR, THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL."

The State, on page 42 of its brief argues, "Defense counsel below, however, never contended that this particular instruction was necessary in order to allow the jury to fully consider mitigation, and Appellee would contended that this portion of Appellant's argument on appeal is procedurally barred." (Citations omitted.)

The State makes new law with that argument. If Bowles can raise only on appeal what he argued below, Steinhorst v. State, 412 So.2d 332 (Fla. 1982), he can only argue what the State on appeal says he should have presented below. That is not the law. To preserve an issue dealing with a jury instruction, counsel needed to either have presented the court with a requested instruction, or to have objected to the one given. Walls v. State, 641 So.2d 381, 387 (Fla. 1994). Bowles presented, at the charge conference, a requested instruction that would have clarified the especially heinous, atrocious, or cruel guidance (2 R 374 5 R 920-21). He has done all this Court has required him to do. The issue is preserved for this Court's examination.

ISSUE VII

DEATH IS A DISPROPORTIONATE SENTENCE TO IMPOSE IN THIS CASE.

On page 48 of its brief, the State, relying in part on the trial court's sentencing order says "Although the judge afforded weight to testimony concerning Bowles' early life, he did note that Bowles' mother and brother had 'overstated' the amount of abuse and violence in the home, and further observed that Appellant's own 'uncontrollable conduct may have sparked some of the violence and abuse.' (RIII 464)" That statement by the trial court is outrageous and it should be ashamed to have said it.

First, there is absolutely no evidence that Bowles' alcoholic mother and drunken brother "overstated" anything. The trial court is speculating that is so, and it reflects more that Judge Schemers is a decent man who probably came from a loving home. He simply could not believe that a mother could be perpetually drunk and her husbands beat, stomped, and smashed Gary Bowles against the floor, the walls, and the furniture for years. It is incomprehensible, and one wishes the mother and son had "overstated" the case, but there is no evidence Bowles ever felt a mother's tender hug or a father's loving embrace.

That Bowles became uncontrollable was predictable. It is not normal for an eleven year old boy to be "uncontrollable." It is not normal for a 13-year-old lad to run away from home. It is not normal for a mother to have no concern that her son is living on the streets. And it is not normal for a boy/teenager/man to live from day to day selling his body to hundreds, perhaps thousands of men. And for the court below and the State here to dismiss this terror with the quip that Bowles somehow deserved the beatings, the fear, and the terror because he was "uncontrollable" is an outrage. When the ragged head of child abuse raises its ugly face and spits in this Court's face, it is not a time to dismiss it with shrug and sigh and say "Oh, well, he

deserved what he got, and besides that was all a long time ago." Wickham v. State, 593 So.2d 191 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Wuornos v. State, 644 So.2d 1012 (Fla. 1994). Children do not outgrow days, weeks, and years of unrelenting whippings, bruised faces, broken bones, and terror. Nibert, at 1062 ("The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end.") The abuse persists, and in Bowles' case it could only have intensified when he fled his home and moved into the streets. If he suffered at the hands of step-fathers while an indifferent mother tried to commit suicide (10 T 1155), why should his life have been any better once unknown men began using his body? The legislature has recognized the persisting evil of child abuse, Section 90.803(23) Fla. Stat (1985); Department of Health and Rehabilitative Services v. M.B., 22 Fla. L. Weekly S564 (Fla. May 29, 1997). This court also did so in Nibert, and it should reaffirm that the lifetime scarring of child abuse can mitigate a death sentence.

Lawyers and judges can fire cases back and forth, and we impress each other with our ability to argue, distinguish, and find a hole to fit the Bowles' peg. But, stripped of the legal gamesmanship, we have a case here of a boy never quite grown up who has lived a life on a dreary, precarious sea of beatings, alcohol, and prostitution. Now, he has murdered another human being. While recognizing the enormity of the wrong he has done, this Court should temper the harshness of society's just condemnation with a recognition that Gary Bowles' past has defined his present. It should reverse the trial court's a sentence of death and remand for imposition of a life sentence.

CONCLUSION

Based on the arguments presented here, the Appellant, Gary Bowles, respectfully asks this honorable court to reverse the trial court's sentence and remand for a new sentencing hearing before a jury, or to remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Chief, Capital Appeals, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to appellant on this date, November ___, 1997.

Respectfully submitted,

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