IN THE SUPREME COURT OF FLORIDA

CASE NO: 89,368

ARTURO BENEDITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLEE/CROSS APPELLANT

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POINT I

THE TRIAL JUDGE ERRED IN FAILING TO FIND THE AGGRAVATOR, THE MURDER WAS COMMITTED DURING THE COURSE OF A FELONY.

The definition of felony murder is: "The unlawful killing of a human being . . . [w]hen committed by a person engaged in the perpetration of . . . any . . . [r]obbery . . .." § 782.04(1)(a), Fla. Stat. (1993). In the trial court, Benedith conceded that "he was only convicted of felony murder, and he could not have been convicted but for the underlying felony . . .." (R 458). The underlying felony was robbery, specifically the taking of Mr. Shires' car. (R 1033-1048).

As this Court recently pointed out in *Blanco v. State*, No. 85,118 (Fla. Sept. 18, 1997), "[e]ligibility for this aggravating circumstance is not automatic" because not all felonies will support this aggravator. However, robbery is included in the list of enumerated felonies defining the aggravating circumstance of committed-during-the-course-of-a-felony. § 921.141(5)(d), Fla. Stat. (1993). Thus, Benedith, having been found guilty by the jury of the underlying felony of robbery, qualified for this aggravator. The trial judge erred in failing to find same.

On appeal, Benedith attempts to avoid this aggravator claiming that "[t]he logical explanation for the trial court's sentencing order is that the robbery was an afterthought of the initial shooting." (Defendant's RB/AB at 11). First, it is pointed out that Benedith did not present this "afterthought" argument to the

trial court at the lengthy hearing during which the subject aggravator was discussed. Rather, he erroneously asserted that to qualify for the aggravator, the State had to establish that Benedith was a major participant in the crime and that its evidence had not done so. (R 457-463). Thus, the instant claim is procedurally barred for failure to assert it in the lower court.[1]

Assuming that the claim is properly before this Court, it is without merit. In *Bruno v. State*, 574 So.2d 76 (Fla. 1991), this Court addressed a similar claim. Bruno left the premises where he had murdered his victims and returned shortly thereafter to take a stereo. He contended that taking the stereo was "an afterthought that was unrelated to his attack" on the victims. 574 So.2d at 80. Soundly rejecting that claim, this Court noted that a month earlier, Bruno asked a man to let him use his car "to borrow a bunch of stereo equipment." *Id.* On the night of the murder, Bruno borrowed a car and "said he was going '[t]o get stereo equipment.'" *Id.* At the crime scene, "he was admiring the stereo just prior to hitting Merlano over the head with a crowbar." *Id.* This Court held that it could reasonably be concluded "that Bruno possessed

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[1] The only other basis he offered for his position was that the robbery was "a feature of his conviction and not really an aggravating factor." (R 453). Benedith has not made this claim on appeal. However, had he done so, it too would have been meritless. *See Brown v. State*, 473 So.2d 1260, 1267 (Fla. 1985); *White v. State*, 403 So.2d 331, 335-336 (Fla. 1981), *cert. denied*, 463 U.S. 1229 (1983).

the requisite intent to commit the crime of robbery at the time he committed the murder." *Id.*

In the instant case, a few hours before the murder, Benedith told Mr. Loblack that he "was getting a car, and he wanted me to paint the car for them because they want to go to New York." (T 1250). Benedith was seen talking to Mr. Shires, who was standing in the open car door, papers in hand, just prior to being shot three times and having his car stolen. Shortly thereafter, Benedith returned to Mr. Loblack with Mr. Shires' car, told him he had "got a car," and asked Mr. Loblack "to paint that car for him to get to New York." (T 1250, 1252). Clearly, the transaction, which the jury conclusively found by its verdict to be a robbery, was not an afterthought.

Further, the State disputes Benedith's claim that "there is no direct or circumstantial evidence as to who fired the gun and the motive of the shooting."[2] (Defendant's RB/AB 11). It has been conclusively established by the jury's verdict that Benedith robbed Mr. Shires of his car, and during the course of that robbery, he murdered Mr. Shires. Certainly, the robbery is evidence of a motive to kill Mr. Shires. There was no evidence of any other, or

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[2] The circumstantial evidence, and logical inferences therefrom, indicates that Benedith was the shooter. (*See* Point I, State's Answer Brief, at 25-26).

additional, motive for the murder.[3] Thus, the evidence conclusively established that Benedith's motive in killing Mr. Shires was to rob him of his car. Where the motive was the robbery, it certainly cannot be said that the robbery was a mere afterthought of the murder. *See Finney v. State*, 660 So.2d 674, 680 (Fla. 1995).

[3]Neither did Benedith argue to the jury, or the judge, that Mr. Shires was killed for any reason other than to rob him of his car.

POINT II

THE TRIAL COURT ERRED IN PRECLUDING THE STATE FROM PUTTING ON EVIDENCE RELATING TO THE DEGREE OF CULPABILITY OF THE CODEFENDANTS.

In its brief on cross-appeal on this point, the State inadvertently omitted two sentences from the final draft of the brief. The sentences belong in the approximate middle of the second full paragraph. That paragraph should read:

> "Once the defense argues the existence of mitigators, the state has a right to rebut through any means permitted by the rules of evidence, and defense will not be heard to complain otherwise." *Wuornos v. State*, 644 So.2d 1000, 1009-1010 (Fla. 1994), *cert. denied*, 115 S.Ct. 1705 (1995). In *Gore v. State*, the defense sought to establish equal culpability with Gore's co-defendant who had been convicted of manslaughter for the same crimes. No. 80,916, slip op. at 7 (Fla. July 17, 1997). This Court said that the state was entitled to put on testimony showing why the co-defendant received "more lenient treatment." *Id.* Thus, the evidence on which the State based its determination that young Taylor's level of culpability for the instant crimes was less than Benedith's was admissible. *Gore*; *Wuornos.*

(previously omitted text is underlined). The undersigned apologizes for the clerical error.

In his answer brief, Benedith acknowledges that "[b]ased upon the state's expert testimony of the co-defendant's reported mental condition, . . . he [Taylor] would likely have . . . received a

substantially lesser sentence."[4] (Defendant's RB/AB at 12). The proffered testimony of the State's expert, Dr. Reibsame, compels that conclusion. That evidence was relevant to both the proportionality issue and the mitigating factor analysis, and it should have been admitted. The trial judge's error in excluding it is harmless only if the death penalty is affirmed by this Honorable Court.

CONCLUSION

Based upon the foregoing arguments and authorities, Benedith's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

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[4]Indeed, Benedith opines that Taylor "would likely" have been "tried and sentenced as a juvenile." (Defendant's RB/AB at 12).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U.S. Mail to George D. E. Burden, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 12th day of February, 1998.

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Of counsel