IN THE SUPREME COURT OF FLORIDA

ARTURO BENEDITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 89,368

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

REPLY BRIEF OF APPELLANT
ANSWER BRIEF OF CROSS-APPELLEE

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT/
CROSS APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

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ARTURO BENEDITH,)
)
Appellant,)
)
VS.) CASE NO. 89,368
)
STATE OF FLORIDA,)
)
Appellee .)

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY AND IN SUPPORT THAT THE CONVICTION FOR FIRST-DEGREE FELONY MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT.

The state argues in their answer brief that the eyewitness testimony of Mr. Lane and Mr. Loblack was direct evidence of appellant's guilt. Appellant disagrees. Lane and Loblack's testimony was circumstantial evidence of appellant's guilt because Mr. Lane's testimony was that the appellant and co-defendant Taylor were at the scene of Mr. Shires' murder just before the fatal shots were fired. Mr. Loblack's testmony was that the appellant was in possession of the victim's car after the murder. (Appellee Brief p. 19) The State relies upon the case of Orme v. State, 677 So.2d 258 for the proposition that there is direct evidence of the murder.

The appellant submits that Orme is distinguishable from Orme, the instant case. The defendant had an extensive history of substance abuse and on the morning after the murder appeared at a treatment center, disoriented and unable to respond to questions, but he did manage to write a message: the place where the victim could be found. The victim was found badly beaten. Semen was found in the victim's orifices, but DNA testing could not identify a DNA match. One sample taken from the victim's panties, however, held material that matched the pattern of the defendant's DNA. The defendant's underpants also had a mixed blood stain matching both the defendant's and the victim's genotype. The defendant's fingerprints were found in the motel room, and his checkbook and identification card were found in the victim's car, which was parked outside. **Upon questioning by police, the defendant admitted that he had summoned the victim to the motel room the day she was killed because he was having a "bad high" after freebasing cocaine.** The defendant and victim had known each other for some time, and the defendant called her because she was a nurse.

At trial, a cab driver testified that he had picked up the defendant at the murder scene around 8 p.m. A man who lived across from the murder scene, Joseph Lee, testified that he first noticed the victim's automobile there around 9:30 or 10 p.m. Lee said he saw the defendant leave and return several times. Before going to bed around 2 a.m., Lee said he saw the defendant leave in the victim's car once more. Another witness, Ann Thicklin, saw someone slowly drive the victim's car into the murder scene around 6: 15 a.m.

Orme argued that the trial court should have directed a judgment of acquittal on grounds the case against him was circumstantial and the State had failed to disprove all

reasonable hypotheses of innocence. As his hypothesis, Orme contended that during his absence from the motel room an unknown assailant entered and killed Redd, with Orme discovering the body later in the morning. According to Orme, this hypothesis is entirely consistent with the direct evidence presented at trial, thus requiring a directed verdict under Davis v. State, 90 So.2d 629, 631 (Fla.1956).

The appellant asserts that the state's reliance on Orme is not persuasive. The facts of Orme are different. The statements made by the defendant after the murder. As this Court observed in McArthur v. State, 351 So.2d 972 (Fla.1977); that "a review of prior decisions . .. is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique." McArthur at 976. The instant case is distinguishable for three reasons: First, in the instant case there was a co-defendant who likely fired the fatal shot; and two, the defendant in this case did not testify or make statements where inconsistencies could be weighed against the defendant by the trier of fact; three, the trial court refused to instruct the jury on premeditated murder and refused to find the felony-murder aggravating factor.

The instant case is more closely analagous to Fowler v, State, 492 So.2d 1344 (Fla.App. 1 Dist. 1986). In Fowler, the state argued that the victim, Hampton Jerkins, picked up Fowler while the latter was hitchhiking along an interstate highway. The state theorized that while Jerkins and Fowler were traveling down a dirt road to Fowler's grandmother's house, Fowler decided to rob Jerkins, so he took Jerkins' rifle and forced him to stop the car, made him get out of the car and get down on his hands and knees in the road, and, while standing over Jerkins, shot him in the back. Fowler then took Jerkins' car and wallet and

drove back to Pensacola. The jury exonerated Fowler of premeditated murder, but found him guilty of armed robbery and guilty of felony murder while committing robbery. The trial court denied Fowler's motion for judgment of acquittal and entered a judgment based on the jury verdict.

In reversing Fowler's judgement and sentence the First District Court reasoned that to convict Fowler of the felony murder charge, the state had to prove that Fowler killed Jerkins while "engaged in the perpetration of, or in the attempt to perpetrate . . . robbery." Sec. 782.04(1)(a), Fla.Stat. (1983). To convict for armed robbery, the state had to prove that Fowler took "money or other property" from Jerkins "by force, violence, assault, or putting in fear" and "in the course of committing the robbery . . . carried a firearm or other deadly weapon." Sec. 812.13, Fla.Stat. (1983). Therefore, it was absolutely essential that the record contain competent evidence to establish that Fowler took Jerkins' wallet by force and violence and killed him during the process. Fowler admitted the shooting, but contended it was purely accidental and that he did not rob Jerkins. He stated that after the shooting he found the wallet in Jerkins' car and took it when he left the car several hours after the accidental shooting,

In arguing to affirm the trial court's denial of the motion for judgement of acquittal, the state argued that, under Rose v. State, 425 So.2d 521 (Fla.1983), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed. 812 (1983), and Heinev v. State, 447 So.2d 210 (Fla.1984), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1985), whether defendant is guilty beyond a reasonable doubt is a question only the jury, not the court, may decide. The appeals court rejected the state's argument and the following lengthy discussion is instructive as to the

State's faulty rationale:

> While these long-standing principles impose a stringent standard of proof on the state in circumstantial evidence cases, it has been argued in recent years that this standard of proof has been relaxed by several appellate decisions which appear to curtail the court's power to decide whether the evidence is inconsistent with any reasonable hypothesis of innocence. In both Heinev v. State, and Rose v. State the Supreme Court said that "the question of whether the [circumstantial] evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury's verdict, we will not reverse a judgment based upon a verdict returned by the jury." More recently, in Buenoano v. State, 478 So.2d 387, this court, following Heiney, said, "The special standard governing sufficiency of evidence in circumstantial evidence cases does not, of course, mean that the trier of fact must believe the defense witnesses regarding facts on which the state has presented contrary testimony " and that "the state . . . is entitled on appeal to a view of any conflicting evidence in the light most favorable to the jury's verdict." Id. at 390 (emphasis supplied). These decisions, the state argues to us, require that we must defer to the jury verdict as we are not permitted to substitute our judgment for the jury's
>
> Despite the apparent inconsistency of the statements of law quoted from the various decisions, neither Heiney nor Rose has disturbed the long-standing principles enunciated in Mayo and McArthur. As we read Mayo and McArthur, the court held that a conviction returned by the jury could not be sustained by the court unless there was competent and substantial evidence "inconsistent with any reasonable hypothesis of innocence. " In other words, it is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence. This must be so because "the version of events related by the defense must be believed if the circumstances do not show that version to be false." McArthur at 976. (FN3) Even in our recent opinion in Buenoano we recognized that the jury could choose to disbelieve the defense only "regarding facts on which the state has presented contrary testimony." Buenoano at 390. Otherwise, there would be no function or role for the courts in reviewing circumstantial evidence, as was stated so well in Davis v. State, 436 So.2d at 200: "If we were to follow the

> state's logic, a trial judge could never answer that question and could never grant a motion for judgment of acquittal pursuant to Florida Rule of Criminal Procedure 3.380 when the evidence [is] circumstantial. Instead, every case would have to go to the jury. "

Fowler at 1347.

The trial judge erred by not granting an acquittal to the charge because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to show that Benedith was involved in a criminal plan to rob John Shires; the proof fails to show that Benedith killed John Shires. The demonstrative evidence of Benedith's guilt is entirely circumstantial. To conclude that the shooting occurred as described by the state, would amount to pure speculation. The state failed to carry its burden in the case at bar. The state merely demonstrated that Benedith appeared at an appointment to purchase an automobile, and after the shooting left the scene. Benedith's actions could be explained in a manner consistent with innocence, i.e., Benedith drove off in an automobile he intended on purchasing after the unexplained shooting of Shires by Thomas. Pursuant to McArthur v. State, 351 So.2d 972 (Fla. 1977), as a matter of law the state's evidence is insufficient to support the verdict. The conviction rests on pure speculation. A first-degree felony murder conviction that rests on such equivocal evidence violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the conviction must be reversed and Benedith discharged from Florida custody.

POINT II

IN REPLY AND IN SUPPORT THAT THT APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State's Answer failed to mention this Court's role in performing portionality review, therefore it is appropriate to mention again: Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). Accord Hudson v. State, 538 So.2d 829 at 831 (Fla. 1989); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Tillman v. State, 591 So.2d 167 (Fla. 1991).

In the initial brief, Benedith argues that Terry v. State, 668 So.2d 954 (Fla. 1996) is controlling. The state contends that this Court's recent decision of Cole v. State, 22 F.L.W S587 (Fla. October 3, 1997) diminishes the authority of Terry because in Cole the "the aggravating circumstance here is predicated upon Cole's actions." Benedith's reliance on Terry is because of the inability to compare this murder to others due to the lack of evidence.

> In this case, it is clear that the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting are unclear. There is evidence in the record to support the theory that this was a "robbery gone bad. " In the end, though, we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot.

Terry at 957.

The state's reliance on Windom v. State, 656 So.2d 432 (Fla. 1995) is misplaced. Windom stands for the proposition that where the sole aggravating circumstance is a prior violent felony, it can support the death penalty when the prior violent felony is particularly weighty. In Windom, the prior violent felonies were **two contemporaneous murders** and a **contemporaneous attempted murder.** In the instant case, Benedith's prior violent felony was the subsequent conviction of attempted robbery in the second degree. The difference between Windom and the instant case is too great for it be relevant authority on the issue of proportionality review.

Similarly, the State's reliance on Hunter v. State, 660 So.2d 244 (Fla. 1995) is misplaced. The State fails to mention that in Hunter there were **three contemuoraneous counts of attemwted murder** from gunshot wounds. The difference between Hunter and the instant case is too great for it be relevant authority on the issue of proportionality review.

In this case, despite the state's assertions, the evidence is inconclusive as to who fired the fatal shots, although Appellant's co-defendant was likely in possession of the murder weapon hours before the shooting. In fact, the attorney general's argument concerning who the shooter was not made by the state at trial and should be ignored here. A comparison of

this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. Although this Court has affirmed the death penalty based solely on this aggravating factor, it has only been done where the prior violent felony was murder. As in Sinclair and Thompson, this Court should find that the circumstances here insufficient to support the imposition of the death penalty. This Court should find that the circumstances here do not meet the test that this Court laid down in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes. "

STATE'S CROSS APPEAL

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THE AGGRAVATOR, THE MURDER WAS COMMITTED DURING THE COURSE OF A FELONY .

After hearing all the evidence, after strenuous argument by the state, and after the jury verdict of robbery, the trial court ruled that the aggravating circumstance that the murder was committed during the course of a felony was not proven beyond a reasonable doubt. Cross-Appellee contends that a trial court ruling comes to a reviewing court with a presumption of correctness. Stone v. State, 378 So.2d 765 (Fla.1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980). Moreover, a reviewing court should not substitute its judgment for that of a trial court, but, rather, should defer to the trial court's authority as a factfinder. DeConingh v. State, 433 So.2d 501 (Fla.1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984).

In the cross-appeal, the State's argument, without further explanation, is that the jury's verdict of guilty of robbery alone establishes the felony-murder aggravating circumstance beyond a reasonable doubt. This simply is not the law. The state relies upon Cole v. State, 22 FLW S587 (Fla. September 18, 1997); Perry v. State, 522 So.2d 817 (Fla. 1988); (defendant confessed that the murder occurred during the course of the robbery of the victim) and Clark v. State, 443 So.2d 973 (Fla. 1983). The state's authority is distinguishable from the instant case,

In Cole, the evidence of the aggravating factor was the testimony of the surviving victim that the motive of the initial attack of the victims was robbery. In Perry, the defendant

confessed that the victim was murdered during the course of a robbery. In Clark, the murder occurred after the armed robbery of the sign store. In the instant case, there is no direct or circumstantial evidence as to who fired the gun and the motive of the shooting, only the "logical inferences" drawn by the state.. Undoubtedly, the reason the trial court did not find the aggravating factor was the lack of evidence.

The controlling law on this issue is that the burden is upon the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Not even "logical inferences" drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met. See Clark v. State, 443 So.2d 973 (Fla. 1983) The trial court did not find this aggravating circumstance because it was not proven. The logical explanation for the trial court's sentencing order is that the robbery was an afterthought of the initial shooting. To otherwise disturb the order of the trial court will require this reviewing court to engage in the pyramiding of logical inferences which is not a substitute for lawful evidence. The trial court's order in this matter should not be disturbed.

POINT II

THE TRIAL COURT DID NOT ERR IN PRECLUDING THE STATE FROM PUTTING ON EVIDENCE RELATING TO THE CULPABILITY OF THE CO-DEFENDANTS.

The state argues that the trial court improperly precluded the State from presenting evidence to rebut the non-statutory mitigator that the accomplice was sentenced to a lesser crime. Specifically, the State would have offered expert medical testimony that the co-defendant had a low IQ., was mildly retarded, and had a long-standing history of learning disability to explain the decision not to prosecute the co-defendant for first-degree murder. This argument has no merit,

The State first reportedly offered a plea deal of a lesser crime to the co-defendant to avoid a trial for first degree murder for a person that was not eligible for the death penalty. This makes sense because the co-defendant plea deal was a sentence of twenty years incarceration followed by seven years probation. Based upon the state's expert testimony of the co-defendant's reported mental condition, had the 14 year old co-defendant with the mental age of 11 years sought a trial he would likely would have been tried and sentenced as a juvenile and received a substantially lesser sentence.

Even if it was error to omit the testimony, the omission was harmless error. It was harmless error because the trial court gave this non-statutory mitigating factor little weight because as a matter of law the co-defendant was not eligible for the death penalty. (R519) Therefore, the lesser sentence was not a matter of unfair preferential treatment by the state, or because of a recognition by the state that co-defendant had lesser culpability, it occurred because as a matter of law the state had no alternative.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to:

As to Point I, vacate the conviction and sentence;

As to Points II, III, and XIII, vacate Appellant's death sentence and remand for imposition of a life sentence;

As to Points IV, VI, VII, and X, grant a new trial;

As to Points V, VIII, IX, XI, XII, and XIV, grant a new penalty phase; and,

As to Point XV, vacate Appellant's life sentence as to Count II and remand for a new sentencing proceeding pursuant to the guidelines.

As to State's Point I on cross-appeal, affirm the decision of the trial court.

As to State's Point II on cross-appeal, affirm the decision of the trial court.

Respectfully submitted,

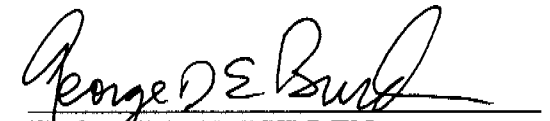
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT/
CROSS-APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Arturo Benedith, DC #703523 (G-22-07-S), Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 9th day of December, 1997.



GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER