

IN THE SUPREME COURT OF FLORIDA

BRANDY BAIN JENNINGS,

Appellant,

vs.

CASE NO. 89,550

STATE OF FLORIDA,

Appellee.

_____ /

SUPPLEMENTAL BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

The appellant's sentence is not improper. The prosecutor's reference to codefendant Graves as a leader in some aspects of the robbery did not preclude the appellant's death sentence. The statement is not properly considered as part of this Court's proportionality review, and it does not demonstrate that Graves was more culpable in these murders. To the extent that the appellant is attempting to present a claim of prosecutorial misconduct, the assertion is not properly before this Court and, even if considered, without merit.

SUPPLEMENTAL ARGUMENT

WHETHER THE APPELLANT'S DEATH SENTENCE IS
IMPROPER DUE TO THE IMPOSITION OF A LIFE
SENTENCE ON THE APPELLANT'S CODEFENDANT.

The appellant now claims that, because the prosecutor characterized codefendant Charles Graves as the "leader" of this robbery, the state should be estopped from claiming that the appellant was the dominant force behind these murders. However, the fact that Graves received a life sentence does not justify reducing the appellant's sentence to life, even when considered in light of the state's closing argument in the Graves trial.

For obvious reasons, this Court has never determined the relative culpability of the parties based solely, or even primarily, on the state's characterization of the respective roles of the parties. Clearly, it is the *evidence* and, when available and supported by the record, *findings* by the trier of fact that are relevant, not the prosecutor's interpretation of the evidence. See, Hazen v. State, 22 Fla. L. Weekly S546 (Fla. Sept. 4, 1997) (noting *trial court's finding* that Hazen was a "follower"); Puccio v. State, 22 Fla. L. Weekly S721 (Fla. Nov. 20, 1997) (*evidence* failed to support finding that Puccio was more culpable).

In this case, the evidence clearly established that the parties were not equally culpable -- the appellant was the actual killer, while Graves, although a major participant, was not. The

court below rejected the claimed statutory mitigating factor that the appellant was acting under Graves' domination, and the rejection of that mitigator has not been challenged on appeal. In addition, the trial court expressly noted that the state's theory that the appellant was the killer had been consistent in both cases. This finding, for the reasons expressed in the appellee's Answer Brief, was supported by the record.

The prosecutor's comments offered by the appellant herein are particularly irrelevant to this Court's consideration of relative culpability when they are considered in the context in which they were made. In response to Graves' defense that the appellant had been the killer and Graves' participation in this offense was minor, it was critical for the prosecutor to remind jurors of the seriousness of Graves' involvement. Jurors have certainly been known to exercise mercy and grant a "jury pardon," even though this violates their oath as jurors. State v. Espinosa, 686 So.2d 1345, 1348-49 (Fla. 1996); United States v. Funches, Case No. 96-5244 (11th Cir. February 24, 1998). Prosecutors have an obligation to prevent a miscarriage of justice, and emphasizing the major role which Graves played in this crime was a proper means of securing justice.

These comments, however, should not be used to cast doubt on the conclusion that the appellant was more culpable in these

offenses. The comments were offered as the prosecutor reviewed Graves' description of the crime from his own confession, evidence which was not admitted in the appellant's trial. It is not surprising that the prosecutor would focus on Graves' actions, such as Graves' jumping Siddle to gain access to the restaurant and holding a pellet gun on the victims as they were bound and then slaughtered in the freezer. The fact is that Graves may have "led" the appellant in some aspects of the robbery, but the appellant was clearly the dominant force in the murders. None of Graves' actions detract from the conclusion that the appellant was more culpable under the totality of the circumstances.

This Court's proportionality review involves comparing the nature and quality of the aggravating and mitigating factors with other factually similar cases. Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). Individual culpability for a capital crime, for purposes of determining appropriate sentences, should rest on assessing the applicability of the aggravating and mitigating factors for the individual participants. Henyard v. State, 689 So.2d 239, 254 (Fla. 1996), cert. denied, 118 S.Ct. 130 (1997). Thus, it is not solely the respective roles played by the parties that determines the appropriate sentence. In this case, Graves' age of 18 suggests that Graves may have had at least one statutory mitigator that would not be applicable to the appellant.

The relative culpability among codefendants becomes a consideration for a proportionality analysis because disparate treatment among equally culpable codefendants *may* be a mitigating factor. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988); Witt v. State, 342 So.2d 497, 500 (Fla.) (codefendant's life sentence was a factor which had to be considered in sentencing defendant), cert. denied, 434 U.S. 935 (1977). Since the appellant's sentencing judge and jury weighed Graves' life sentence as a mitigating factor in the appellant's sentence, no error has been presented.

To the extent that the appellant is seeking relief premised on prosecutorial misconduct due to the statements in Graves' trial, his claim is not properly before this Court. The comments now asserted were available at the time of the appellant's trial, but this argument was never presented to the court below. Therefore, appellate review is precluded. Steinhorst v. State, 412 So.2d 332, 335 (Fla. 1982).

Even if considered, however, a claim of prosecutorial misconduct is not demonstrated on these facts. In Parker v. State, 542 So.2d 356, 358 (Fla. 1989), this Court rejected the assertion that prosecutor was required to disclose to Parker's jury that the state's position in a codefendant's trial had not been consistent on the question of who had fired the fatal shot. Similarly, in considering the same offense, the Eleventh Circuit rejected a claim

of prosecutorial misconduct in Bush v. Wainwright, 988 F.2d 1082 (11th Cir. 1993). The Eleventh Circuit held that the prosecutor's presentation was not inaccurate, despite an isolated statement suggesting that Bush was the triggerman. See also, Bush v. State, 682 So.2d 85, 87 (Fla. 1996). In the instant case, the accusation is not as serious as that in Parker, because the state is not alleged to have offered a different version of events, only to have described both codefendants as major players in the crime.

The case of Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986), affirmed, 828 F.2d 670 (11th Cir. 1987), cited by the appellant, does not demonstrate any error. In Troedel, the court granted relief after the state had presented misleading testimony by an expert as to which person had fired the murder weapon. The instant case does not involve any allegation of the state's knowing use of misleading evidence.

In conclusion, the appellant's suggestion of prosecutorial misconduct is not properly before this Court, and, even if considered, without merit. His assertion that the state's reference to Graves as a "leader" requires this Court to reduce his sentence is similarly unavailing. On the facts of this case, the trial court's imposition of the appellant's death sentence was proper, and this Court must affirm the sentence.

CONCLUSION

Based on the foregoing arguments and authorities, the appellant's sentence should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert Moeller, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-- Drawer PD, Bartow, Florida, 33831, this _____ day of March, 1998.

COUNSEL FOR APPELLEE