IN THE SUPREME COURT OF FLORIDA

DAVID CHARLES CARPENTER,	:	
Appellant,	:	
vs.	:	Case No. 90,349
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify that the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

Appellant, David Charles Carpenter, will rely upon his initial brief in reply to Appellee's arguments as to Issue V.

STATEMENT OF THE CASE AND FACTS

On page 1 of its brief, Appellee states that Appellant's codefendant, Neilan Pailing, was five feet, ten inches to six feet tall. However, Detective James Steffens testified that Pailing was actually six feet tall, or possibly six feet, one inch, "if you include his hair." (Vol. 31, pp. 679-680)

On page 1 of its brief, Appellee says that Appellant's "apartment was a small, one-room efficiency (V30/T619)." State witness Detective James Steffens of the Clearwater Police Department testified that the apartment was "probably maybe fifteen feet wide with maybe thirty feet in length." (Vol. 39, p. 1967)

On page 2 of its brief, Appellee states that the medical examiner "testified that it would take at least fifteen seconds of continuous, complete vein occlusion to render Powell unconscious, and then another several minutes of continuous pressure for death to occur." Actually, Dr. Marie Hansen initially said it would take "10 to 15 seconds" to cause unconsciousness, although she then used the 15-second time period, and that it could "take up to two to three more minutes of complete total occlusion" to bring about death. (Vol. 33, pp. 1018-1019)

ARGUMENT

ISSUE I

THE EVIDENCE ADDUCED BELOW WAS INSUFFICIENT TO ESTABLISH APPELLANT'S GUILT OF EITHER PREMEDITATED OR FELONY MURDER.

After first accusing Appellee of "ignoring" the testimony of jailhouse snitch Steven Dakowitz in Appellant's initial brief, Appellee then concedes that Appellant did address Dakowitz' testimony, but complains that he dismissed Dakowitz' testimony "with one sentence, suggesting that Dakowitz' was too 'ambiguous' to provide competent evidence." (Answer Brief of the Appellee, p. 6) However, Dakowitz himself testified that he did not "really know exactly what [Appellant] meant" when he said things were "just the opposite" of what he had initially told Dakowitz, and that Appellant "didn't go into specifics" regarding what his role was in Ann Powell's death. (Vol. 32, pp. 971-972) This vague testimony is hardly the kind of evidence that should lead anyone to the "inescapable conclusion that Carpenter admitted to Dakowitz that Carpenter was the primary perpetrator in Powell's murder." (Answer Brief of the Appellee, p. 6) Appellant made no such clear admission.

On page 7 of its brief, Appellee asserts that Appellant "fabricated an explanation for the police as to the presence of his fingerprints on Powell's car." Presumably, Appellee is referring to Appellant's statement to the police that he worked on the fuse for the trunk light of Ann Powell's car. The State never proved that this was a "fabrication;" Appellant may very well have worked

on Powell's car. [The police found the trunk light and fuses to be operational, thus indicating that they either had been repaired, or were never defective. (Vol. 31, pp. 710-711)]

At pages 7-8 of its brief, the State argues that the jury was entitled to conclude that Appellant's statements about what happened to Ann Powell were not true because they were inconsistent with one another. However, the prosecution still bore the burden of proving Appellant's guilt from the evidence, and the evidence presented was inadequate to meet this burden.

Appellee discusses Hitchcock v. State, 413 So. 2d 741 (Fla. 1982) on pages 9-10 of its brief, but Hitchcock involved facts quite different from those of the instant case. Hitchcock admitted that he choked the victim while still in her bedroom, then carried her outside where he again choked and beat her until she was quiet, and hid her body in some bushes. Here, Appellant made no such admissions, nor did the facts adduced at trial show such a prolonged and determined effort to silence the victim. Hitchcock's claim that the victim consented to sex was unreasonable in light of such circumstances as the time of night (around 2:30 a.m.), entry into her bedroom through a window, her age (13), and her previous chaste character. In contrast, Ann Powell was an experienced woman of the age of 62, who went to Appellant's residence willingly, at a reasonable hour.

On page 10 of its brief, Appellee cites Larry v. State, 104 So. 2d 352 (Fla. 1958) for the proposition that the existence of premeditation may be inferred from such factors as "the nature of

the weapon, the presence or absence of provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature and manner of the wounds, and the accused's actions before and after the homicide." In actuality, this Court wrote the following in Larry:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

104 So. 2d at 354. Contrary to Appellee's representation, the Court said nothing about "the accused's actions before and after the homicide."

On page 11 of its brief, the State cites three district court of appeal cases for the proposition that a jury may infer premeditation from a defendant's actions after the crime. However, in one of these cases, Smith v. State, 496 So. 2d 965 (Fla. 1st DCA 1990), the appellate court determined that the evidence of premeditation was insufficient, and ordered that the appellant's conviction be reduced to murder in the second degree.

Appellee also argues on page 11 that the fact that no evidence of semen was found in swabs taken from Ann Powell is inconsistent with Appellant's "story that Powell was killed in a rage when she belittled Pailing for having ejaculated prematurely." However, there might not be any semen present in the victim, depending upon when and where during the encounter the premature ejaculation occurred.

With regard to the comforter which tested positive for the presence of semen that did not come from either Appellant or Neilan Pailing, which is discussed on page 14 of Appellee's brief, the record is, unfortunately, rather confusing. At various points in the record, the item in which Ann Powell's body was wrapped is described variously as a "blanket" or "comforter." (Vol. 29, pp. 449-450, 480-481; Vol. 30, pp. 591, 646, 659; Vol. 32, pp. 838, 851-853; Vol. 33, p. 998; Vol. 39, p. 2011) At one point, one of the State's witnesses, Technician David Brumfield, referred to Powell being wrapped in "blankets" [plural]. (Vol. 32, p. 838) The State witness who testified regarding the presence of semen, Mary Cortez of the Florida Department of Law Enforcement, merely identified the item on which the semen was found as a comforter which was represented to her as coming from a vehicle. (Vol. 32, pp. 912, 915-916, 921-923) Thus, it is not clear from the record whether or not the comforter in question originally came from Appellant's residence, as Appellee asserts.

Also on page 14 of the answer brief, Appellee cites Rhodes v. State, 638 So. 2d 902 (Fla.), cert. denied, 513 U.S. 1046 (1994) in support of its argument that the evidence was sufficient to support sexual battery as the offense underlying felony murder. Rhodes, however, dealt with whether the evidence of sexual battery was sufficient to support an aggravating circumstance in a capital sentencing proceeding, not whether the evidence would support felony murder. Moreover, Rhodes "told several witnesses that the victim resisted his sexual advances[,]" 638 So. 2d at 926,

compelling evidence of sexual battery which is absent in the instant case.

Appellee states on page 15 of its brief that Ann "Powell was killed with Carpenter's gun[.]" This statement requires some clarification. Powell, of course, was not shot, and the "gun" in question was not a real weapon, but a toy, or "nongun," as Appellant called it. Furthermore, although the medical examiner gave the cause of Powell's death as "homicidal violence, including neck compression and blunt trauma to the head and neck," it appears that death resulted primarily from the neck compression. Finally, although Appellant did indicate in at least one of his statements to the police that Neil Pailing may have his Powell with the "nongun," it was not conclusively established that Appellant's "nongun" inflicted the blunt trauma injuries which contributed to Powell's death.

ISSUE II

THE COURT BELOW ERRED IN GIVING TO APPELLANT'S JURY A NON-STANDARD INSTRUCTION ON FIRST-DEGREE FELONY MURDER WHICH EASED THE STATE'S BURDEN OF PROOF.

On page 17 of its brief, Appellee states that the trial court granted Appellant's request "that a special defense instruction on accessory after the fact and independent acts be given," however, it does not appear the court actually gave any instruction on accessory after the fact to Appellant's jury. (Vol. 7, pp. 1245-1280; Vol. 34, pp. 1251-1278)

Appellant would also note that the court repeated the instruction that Appellant could be guilty as a principal in the instruction on third degree felony murder (with aggravated battery as the underlying felony), thus placing undue emphasis on the concept of guilt as a principal. (Vol. 7, pp. 1261-1264; Vol. 34, pp. 1260-1262)

On the question of preservation for appellate review, one of Appellant's grounds in his motion for new trial was that the trial court in improperly instructing the jury during the guilt phase. (Vol. 8, p. 1390)

In State v. Hamilton, 660 So. 2d 1038, 1046 (Fla. 1995), which the State cites on page 20 of its brief, this Court cautioned against unexplained modifications of the standard jury instructions:

> It is important that trial courts, which retain the critical role of determining the appropriate law upon which the jury should be instructed, indicate the basis of any dis

agreement with the standard jury instructions. The committees that draft standard instructions work hard in developing these restatements of Florida law in clear and straightforward language to assist the courts in carrying out their responsibility to explain the law to citizen jurors. Confidence in the use of these instructions is undermined when their use is rejected without explanation.

ISSUE III

THE TRIAL COURT ERRED IN PREVENTING APPELLANT'S JURY FROM HEARING TESTIMONY REGARDING STATEMENTS APPELLANT'S CODEFENDANT, NEILAN PAILING, MADE TO TWO PEOPLE, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND BY ARTICLE I, SECTIONS 16 AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA, TO PRESENT EVIDENCE AND WITNESSES ON HIS OWN BEHALF TO ESTABLISH A DEFENSE.

At pages 22-23 of its brief, Appellee says that William Shay, whose testimony the court refused to allow Appellant's jury to hear, "admitted" during a proffer of his testimony that he (Shay) "was friends with Carpenter, and although he did not dislike Pailing, that just before Pailing made these statements Shay had made him angry by calling him a rapist." However, Shay also testified that he made Appellant "so mad that he left the [Changing Criminal Thoughts] program," and that Shay and Pailing "were pretty goods friends" who "talked a lot," and that Shay kind of acted as Pailing's protector. (Vol. 34, pp. 1084, 1087-1088) Both the State in its brief and the trial court below in his comments in ruling against the admissibility of the proffered evidence misconstrued Shay's testimony.

At any rate, whether Shay and/or Mendoza was/were friendly toward Appellant and/or disliked Neilan Pailing is really beside the point, as these factors should only go to the weight to be given the proffered testimony, not its admissibility.

On pages 29 of the answer brief, Appellee argues that the proffered testimony implicated Pailing in the murder, but did not exculpate Appellant. However, in that Pailing said that he was the one who raped, killed, and burned the victim, his testimony did at least implicitly exculpate Appellant. Furthermore, the relevant provision of the Evidence Code, section 90.804(2)(c) of the Florida Statutes, does not contain a requirement that the statement sought to be admitted explicitly exonerate the accused as a condition of its admissibility; it needs only to tend to exculpate the accused. Voorhees v. State, 699 So. 2d 602, 613 (Fla. 1997). At the trial below, the respective roles played by the two codefendants was a hotly contested issue, and the jury should have been allowed to consider Appellant's evidence bearing on this issue, and give it such weight as the jury deemed appropriate. See Voorhees, 699 So. 2d at 613.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO USE APPELLANT'S CONVICTION OF A MISDEMEANOR IN THE STATE OF NEVADA AS A PRIOR VIOLENT FELONY AND PERMITTING THE ALLEGED VICTIM OF THAT OFFENSE, ANN DEMERS, TO GIVE EXTREMELY PREJUDICIAL TESTIMONY AT PENALTY PHASE REGARDING CONDUCT FOR WHICH APPELLANT HAD NOT BEEN CONVICTED.

Appellee's argument concerning this issue fails to address such important matters as the fact that Nevada characterized the offense involving Demers as a "misdemeanor," and the applicable principle of law requiring penal statutes to be strictly construed in favor of the accused, which matters are discussed in Appellant's brief. In addition, Appellee apparently assumes, without citing any precedent or discussing the matter, that is appropriate to analyze what happened to Demers in terms of the offense for which Appellant could have been convicted if the incident had occurred in Florida. Nor is it true, as the State submits at page 34 of its brief, that the injuries suffered by Demers "would clearly support a conviction for the felony of aggravated battery in Florida." It appears that Demers did not spend any substantial length of time in the hospital as a result of this incident, and her testimony seemed to indicate that she was treated and released. At any rate, the evidence presented fell far short of "clearly" showing an aggravated battery under Florida law.

Appellee's concession on page 37 of its brief that "Carpenter's second sentencing jury recommended death by a greater

margin [than the first sentencing jury] after hearing Demers' [sic] testify" shows the harmfulness to Appellant when Demers' testimony was added to the State's case.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, David Charles Carpenter, hereby renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 19th day of March, 2001.

Respectfully submitted,

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