IN THE SUPREME COURT OF FLORIDA

ROBERT THOMAS,

Appellant,

v. CASE NO. 91,020

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

CASES PAGE(S)

TABLE OF CITATIONS

(Continued)

CASES PAGE(S)

CONSTITUTIONS AND STATUTES

OTHER SOURCES

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE THAT ABOUT TWO WEEKS AFTER THE MURDER OF IMARA SKINNER, THOMAS WAS SEEN SPEEDING ON INTERSTATE 10 AND WHEN STOPPED HE FLED FROM THE POLICE, EVENTUALLY CRASHING THE CAR HE DROVE AND LEAVING ON FOOT, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

Flight, as evidence of guilt, has its strongest relevance when the police chase a Defendant as he flees a crime. The logical, though not necessarily conclusive, assumption arises that freedom is sweet, and the guilty flee, especially when chased, to keep its taste fresh in their mouths. That assumption becomes stale the longer the defendant remains at large, and the further he is from the crime scene when arrested. In Escobar v. State, 699 So.2d 988 (Fla 1997), the flight evidence occurred a month after and 2,000 miles away from the Florida murder the defendants were later tried for committing. In Merritt v. State, 523 So.2d 573 (Fla. 1988), nine months after the police questioned Merritt about a homicide in this case, he tried to escape from a jail in Virginia. This Court found the flight evidence in both cases had no relevance except to cast a bad light on the defendants' character.

Thomas' "flight" evidence, while not as extreme as that in Escobar and Merritt, was as inadmissible. The State presented absolutely no proof Thomas fled from the police because he knew they wanted him for the murder of Imara Skinner. The best it can do is to speculate that "Thomas had every reason to assume that Jacksonville police were looking for the killer." (Appellee's brief at p. 29) Such a wishful assumption is understandable because the record here never provided the "evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in that specific case." Escobar at 996. While the police may have been looking for the killer generally, they were not looking for Thomas specifically.

Accordingly, this Court's recent decision in Shellito v. State, 701 So.2d 837, 840-41 (Fla. 1997), contrasts well. In that case, this Court found more than the State's hypothetical link used here to justify admitting evidence that a day after a murder he had fled the police using deadly force when they raided the apartment where he had stayed. It approved the lower court's ruling admitting that evidence because he had run within 20 hours of the homicide, he had bragged to others in the apartment about the murder shortly before the raid, and he had the gun used in the murder. Id. At 841.

In this instance, we have no similar evidence linking Thomas' "flight" to the murder of Skinner. Thomas had no murder weapon when arrested, and no one testified that he had bragged or said any thing about the Skinner shooting. On the other hand, unlike Shellito, Thomas had an innocent explanation for why he "fled" the police. When he came to their attention he was speeding on the interstate around Jacksonville because his godchild was ill, and he was taking her back to the hospital. As Carmel Williams testified a doctor there had prescribed some medicine earlier in the evening, but when she discovered the drugstore was closed she had Thomas return her the medical facility. Contrary to State's claim on page 29-30 of its brief that Carmel Williams said the child needed no emergency treatment, she told the jury, "We was in a rush, because she was very--she was real sick, so we were in a rush." (19 R 1415) As they sped along the highway "as quickly as possible, because she was still coughing" (19 R 1416) the police gave chase.

On page 30 of its brief the State claims there is " a strong presumption of admissibility" of flight evidence, even if "reasons other than consciousness of guilt might have support the defendant's decision to flee." No Florida law supports those statements, and it relies on two federal appellate decisions to justify them. United States v. Lacey, 86 F.3d 956 (10th Cir 1996); United States v. Hernandez-

Miranda, 601 F.2d 1104 (9th Cir 1979). In both cases, the defendants the defendants failed to appear for their scheduled trials, and the trial court allowed evidence of their absence to support an inference of guilt. Lacey at 973; Hernandez at 1107.

Obviously, those facts are significantly different than those presented by this case. More important, though, Florida law also differs from the federal standard for admitting flight evidence. Escobar rejected the presumption of admissibility, and in Merritt this Court found such proof inherently ambiguous. Further diminishing the significance of flight evidence, this Court disapproved instructions on flight in Fenelon v. State, 594 So.2d 292, 295 (Fla.1992). See, also, Crocker v. State, 616 So.2d (Fla. 1st DCA 1993)(Flight instruction should not be given when reasonable inferences other than guilt could be drawn from the evidence.)

Moreover, with facts similar to those in the cited federal cases, the Second District Court of Appeals concluded that evidence the defendant fled on the last day of his trial, by itself, was insufficient to justify allowing the prosecution to comment on his absence during its closing argument. "In this case, there was no

evidence indicating the reason appellant failed to appear." Estopinan v. State, 23 Fla. L. Weekly D 900 (Fla. 2d DCA April 1, 998).[1]

Unlike the defendant in Estopinan, Thomas explained why he fled when the police stopped him for speeding. After he pulled his car off to the side of the road, the police "jumped out of their cars as soon as we pulled over, screaming, with their guns out." (19 R 1418). He panicked and sped away, eventually running the car into a ditch (19 R 1421)

Finally, by way of footnote, the State says Thomas has the burden to show the court's error was harmful. First, the State, not him, has that responsibility, DiGuilio v. State, 491 So.2d 1129 (Fla. 1986)("The burden to show the error was harmless must remain on the state."). Second, Section 924.33, Florida Statutes (1997,) has not relieved the State of that duty. See, Heuss v. State, 687 So.2d 823, 824 (Fla. 1996). Finally, this Defendant did argue the harm of the court's error by noting that the prosecution had "repeatedly and at some length used the April 29 police encounter to support it closing argument in the guilt phase of the trial (20 R 1626)." (Footnote omitted) By way of his own footnote, Thomas also added that he had spent "considerable time minimizing the flight evidence during his closing

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[1] These cases also impliedly reject the State's contention on page 26 of its brief that this Court must view the evidence "in the light most favorable to the state on this issue."

argument." That only detracted from his primary argument, that someone other than him had killed Skinner. Besides the flight evidence supported his conviction by giving the jury proof that he had a "bad character," which, of course, is an impermissible reason to admit it. Section 90.404(2), Florida Statutes (1997).

This Court, should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN DENYING THOMAS' MOTION FOR MISTRIAL AFTER MONYE ELVORD, ONE OF THE VICTIMS IN THIS CASE AND THE STATE'S CHIEF WITNESS, HAD AN EMOTIONAL BREAKDOWN WHEN THE PROSECUTOR ASKED HER TO STEP DOWN FROM THE WITNESS STAND AND STAND BY THE PERSONS WHO HAD RAPED AND SHOT HER, A VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

On pages 35-36 of its brief, the State claims that Ms. Elvord's emotional breakdown "supported Thomas' theory of defense." Nice try but no. If so, why did not Thomas use it in his closing argument? If so, why did the prosecutor use it as part of his closing (20 R 1568). If so, why did defense counsel object to Elvord's collapse and ask the court for a mistrial? He did not because it did not help his case. Instead, he had to explain away her collapse, something he should not have had to do (20 R 1623). In truth, the State deliberately created Elvord's emotional crisis by having her stand near her alleged assailants. It then used her courtroom breakdown to incite the jury's sympathies. "She identified him in court. It wasn't a mistake. <u>You saw that, you saw how she reacted. That wasn't imaginary</u>." (20 R 1646) (Emphasis supplied.) Intentionally inducing Ms Elvord to become highly emotional not only introduced an explosive emotional, unfairly prejudicial and completely irrelevant element into this trial, it became just the

latest instance of a long history of unprofessional and unethical conduct on the part of prosecutors (and particularly those of the Fourth Circuit) this Court has repeatedly chastised them about.

On page 34 of its brief, the State claims, "Although Elvord did become emotional, and had to sit down, she recovered quickly and completed her lengthy examination without significant incident." Not so. As noted in the Initial Brief, the court stopped the Davis cross-examination of Ms. Elvord when she became emotional and had her briefly leave the courtroom to regain her composure (15 R 642-43). When Thomas' lawyer examined her she still had some problems controlling her understandable emotions (15 R 675-76).

It must be emphasized that at no time did the court do anything to minimize the damage created by her emotional demonstration. Particularly, it never admonished the jury to ignore the outbreak, questioned them as to the effect her outburst would have on them, urged Ms. Elvord to control herself, or chastised the State for such a blatant effort to elicit jury sympathy. With no check on what it had done, the State took advantage of the scene it had deliberately created. Without any limits placed on it by the court, the prosecutor used Ms Elvord's break down in its closing argument. "[W]hen she walked over and stood behind this man, stood behind him and trembled, her knees wee weak, she cried, and all

the horror and brutality of that night came screaming back to her as she faced this man whom she knew as the man that had abducted her and the man who had killed Imara Skinner." (20 R 1568) The trial court made no effort to control that argument, but this Court has repeatedly noted the improper zeal some prosecutors and those in the Fourth Circuit in particular have used to secure a conviction or death sentence at all costs.

In Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), this Court reminded prosecutors that "Closing argument 'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotion response to the crime or the defendant.

Undeterred, prosecutors were reminded by this Court about improper closing arguments in Garron v. State, 528 So.2d 353, 359 (Fla. 1988): that if comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument."

Undeterred, prosecutors were again admonished by this Court in King v. State, 623 So.2d 486 (Fla. 1993), not to use emotional arguments.

Undeterred, they were again told by this Court in Jones v. State, 705 So.2d 1364, 1367 (Fla. 1998), that "although this legal precept may sometimes be hard to abide, the alternative-a court ruled by emotion-is far worse."

Undeterred, prosecutors, and particularly those in the Fourth Circuit, were pointedly told again in Urbin v. State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998), that emotional appeals were "blatantly impermissible" and were "precisely the type of emotional argument we condemned in Bertolotti, 476 So. 2d at 133." This Court concluded by noting

> The fact that so many of these instances of misconduct are literally verbatim examples of conduct we have unambiguously prohibited in Bertolotti, Garron, and their progeny simply demonstrates that there are some who would ignore our warnings concerning the need for exemplary professional and ethical conduct .[2]

The Fourth Circuit prosecutors simply refuse to follow the law and good professional and ethical behavior. Merely reminding them of their duty has done

[2] The prosecutors in the Fourth Circuit are not the only ones from that circuit to raise this Court's ire. In Miller v. State, 23 Fla. L. Weekly S389 (Fla July 16, 1987), this Court took the extraordinary step of directing new counsel be appointed for Miller's resentencing. Additionally, there is significant evidence the Duval County Sheriff's Office was corrupt and was willing to coerce confessions at any price to insure a conviction and justify sending a man to his death. Jones v. State, 23 Fla. L. Weekly S137 (Fla. March 17, 1998)(Anstead, concurring.)

no good. This Court should reverse Thomas' conviction and sentence and remand for a new trial. Maybe that will get their attention.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO GRANT THOMAS' MOTION FOR A MISTRIAL ONCE IT BECAME OBVIOUS THAT NOT ONLY WAS THE JURY DEADLOCKED DURING ITS GUILT PHASE DELIBERATIONS BUT THAT ALMOST OPEN HOSTILITY AMONG THE JURORS WAS EVIDENT, A VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION.

On page 45 of its brief, the State alleges that Thomas' trial counsel did not "repeatedly" ask for an Allen charge. He did (20 R 1718, 1721, 1732). As the jury deliberated, and particularly as the evening and then the early morning wore on, the evidence the jury's deliberative ability had collapsed became obvious, so the Allen charge could not save the jury. The only choice for the court, as Thomas saw the matter, was to grant a mistrial and start again. Before they went home at 4:20 Sunday morning that was his position (20 R 1738)

When they reconvened about eight hours later, the State suggested that the court give the Allen instruction, but it refused to do so, as it had done when Thomas had made the request (21 R 1743). At that point Thomas withdrew his motion for the Allen charge (21 1746). We do not know why he did this, but there

is no evidence he similarly no longer pressed his more significant motion for mistrial he had made just hours earlier.

Thus, counsel's withdrawal has no effect on this Court's review of the issue presented here. First, it is clear the court would have refused to give the Allen charge, as it had repeatedly denied defense counsel's requests. To have made another request Sunday afternoon would have been futile because when the jury reconvened, the court told Thomas and the State that "the Allen charge simply tells them to do what they have done for the last eight to ten hours." (21 R 1743).[3]

Second, the trial judge was aware of the jury deadlock, but had simply rejected providing the requested guidance. The issue now before this Court was raised below, and the record clearly shows the trial judge refused repeated defense and State requests to give the Allen charge. Thomas has satisfied the requirements of Castor v. State, 365 So.2d 701, 703 (Fla. 1978)("To meet the objectives of any contemporaneous objection rule, an objection must be sufficient specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.") to preserve this issue for appellate review. He never

[3] As pointed out in the Initial Brief at p 47, "it never told them, . . . , that 'if you simply cannot reach a verdict, then returned to the courtroom and I will declare this case mistried and will discharge you.' Fla. Stan. Jury Instr. (Crim.) 3.06." Failing to tell that weary body that they could, in good conscience, admit an inability to reach a unanimous verdict was a crucial omission.

"sandbagged" or hid the problem from the trial court so he could present it to this Court for an easy reversal. Maggard v. State, 399 So.2d 973, 975 (Fla. 1981). Thomas has preserved this issue for appeal

There is likewise no merit to the State's contention that counsel failed to object to comments made by the court (Appellee's brief at pp 45-46). As just discussed, he repeatedly asked it to give the Allen charge. Second, the court and the foreman of the jury had several discussions about the stage of jury deliberations, which counsel had little opportunity to provide input. Rule 3.140, Fla. R. Crim. P.; Mills v. State, 620 So.2d 1006 (Fla.1993); McGlynn v. State, 697 So.2d 571, 572 (Fla. 4 DCA. 1997) ("[T]he trial court responded to the jury's question before giving defense counsel any meaningful opportunity to have input on the court's response. As such error is per se reversible, we give no consideration as to whether it may be harmless.")

Moreover, the court gave little heed to what counsel requested, or the foreman's conclusion that the jury had reached an impasse. When it called them in at 12:14 a.m. the foreman told it that "after discussing it, we all agree that it probably would not change by hearing more testimony." (20 R 1720) The judge then told them it was "not going to keep you here all night, obviously." (20 R

1720), but that is what it did because it asked them to return to their deliberations. "And if that doesn't work, just send word to me." (20 R 1720).

It did not, and by 1:30 the court considered recessing for the night. It brought the jury in again, and told them it would have to sequester them for the evening, something the court "hated" to do, which was the reason "I've let it go this far." (20 R 1725) It told them to continue deliberating while arrangements were made to find motel accommodations.(20 R 1726) Apparently two hours later arrangements had not been made. The court wanted to bring the jury into the courtroom, but the foreman requested that be delayed because he thought they were on the verge of a breakthrough. Apparently, they were not and he said "quite honestly I don't think we'll come any closer tomorrow than we are tonight." (20 R 1727) The court responded by asking them to continue their deliberations, after which Thomas' lawyer made his motion for a mistrial "based on the oppressive nature of wearing one person down." (20 R 1728)

Even when the jury returned barely seven hours later to continue their deliberations, the foreman gave no indication anything had changed. Still, without giving them an Allen charge the court simply told them to continue (21 R 1745).

Thus, while telling the jury to continue their deliberations may not be coercive (Appellee's brief at 46), repeatedly doing so into the early morning hours,

particularly without giving them the guidance provided by Allen, and by ignoring their repeated declarations that they were deadlocked, amounted to judicial coercion.

Also, while the court may not have said they had to reach a decision that night or morning, it clearly put a "time" pressure on them that was different than that present in Webb v. State, 519 So.2d 748, 749 (Fla. 4th DCA 1988); and Heddleson v. State, 512 So.2d 957, 959 (Fla. 4th DCA 1987). (Appellee's Brief at p. 47) Instead of telling them they had to reach a decision that night, it implied they would continue deliberations however long that might last until they had settled on a verdict. The refusal to give them the law that failure to reach a decision was allowed only increased to "oppressive nature of who would wear down first." (20 R 1728).

On page 48 of its brief, the State says "the court never attempted to place blame on the jury or any juror, and made no exhortation of the jury to consider the cost of a retrial or otherwise take into consideration the government's fiscal health."

At 1:30 in the morning, after the jury had heard four hours of closing argument, instructions on the law, had been deliberating more than four hours, and had told the court it was deadlocked, the court told them:

> I know I told you this would be over Thursday or maybe Friday, and here it is Sunday already. But I must do everything that I can to have the matter resolved so that we would not have to start from the beginning on the case.

(17 R 1725)

After two hours of more deliberations and another note from the jury that they were deadlocked, the court told them:

> Now, I wanted to wait as long as we could this evening to see if this could be resolved. I need to all that I can to resolve this matter without repeating it.

(20 R 1735)(Emphasis supplied.)

These comments put subtle coercion on the jury and the holdout juror to reach a decision without regard to their views of the evidence. Thus, even though the court may never explicitly have said the jury had to reach a verdict that was the clear import of what it wanted and what it did by prolonging the deliberations until 3:30 Sunday morning and having them return barely seven hours later. Appellate courts, including this one, have repeatedly recognized the extraordinary sensitivity jurors (particularly deadlocked ones) have to what the trial judge says, even if it is spontaneous. Colbert v. State, 569 So.2d 433, 436 (Fla. 1990) (Kogan, dissenting.) Thus, what the State portrays as nothing more than polite commands, were commands none the less, and jurors could not be faulted for concluding that

the court intended to keep them at their deliberations until they reached a verdict then or the next day, or the next.

Likewise, that the judge may not have personally singled out the holdout juror (at least as far as the record on appeal reveals), he or she knew the court knew that was why deliberations had lasted so long, and that awareness, regardless of the source tended to be coercive.

The State uses considerable space arguing that revealing the numerical split among the jurors was not error. This part of his argument got more attention than it deserves, for the reasons provided in the Answer brief (at least as to the preservation). Yet, the fact remains, the jury split was revealed, and the lone hold out must have felt the pressure of being singled out before the court. That emphasis contaminated the reliability we normally give jury decisions because it put a subtle pressure on him or her to capitulate.

Finally, on page 55, the State claims that deliberating for more than 10 hours was not unusually long. We need to put that in context. The trial had lasted six days, at least two days longer than the court had anticipated and had told the jury (17 R 1725). On Saturday, the trial started at 2:30 p.m., and for the next four hours the lawyers for the defense and State regaled the jury with their arguments for guilt or innocence, and the court gave them the lengthy jury instructions. They

finally got the case about 7 p.m. That is when their 10 hours of deliberation started. Under those circumstances, whatever verdict they returned was coerced, and this Court must reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN FAILING TO GRANT THOMAS' MOTION FOR A JURY VIEW, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State spends more than two pages of its argument on this issue discussing the lighting at the parking lot and in the car, and Elvord's opportunity to see Thomas (Appellee's Brief at pp 56-58). Thomas, in his Initial Brief, used more than a page to present the facts about the lighting in the parking lot, her opportunity to see the driver, and her subsequent description of him (Initial Brief at pp. 52-54). This means, as is obvious from the closing argument, that identity was the only issue in this case (20 R 1580).

The State, on page 59 of its brief, claims that necessity is the standard by which this Court should measure the trial court's ruling denying Thomas' motion for a jury view. That is incorrect. Relevance is the general test of admissibility of evidence. Ruffin v. State, 397 So.2d 277 (Fla. 1981). The specific test for allowing a jury view similarly is one of whether the view will "assist" the jury analyze and apply the evidence presented at trial. Rankin v. State, 143 So.2d 193, 194-95 (Fla. 1962). If so, the trial court has no discretion but to allow the view.

The State, on page 59 of its brief, argues that the court correctly denied Thomas' motion because the view he requested would have misled the jury. A

similar argument could have been made about Elvord's in court identification of Thomas as one of her abductors. He was not wearing the same clothes as he did on the night of the murder. The lighting was different then. He was sitting differently. Yet the court allowed it, and indeed, Thomas would have had no basis to object to her identifying him at trial as the driver of the car. Any complaint about the accuracy of the identification would have gone to the weight of her testimony, not to the admissibility of it.

So here, that the jury would not have seen the parking lot exactly as Elvord saw it on the night of the murder was a consideration for them to use in weighing the significance of what the view revealed. It had, however, no bearing on the admissibility of the jury view of the parking lot.

Finally, it was unfair for the court to have admitted a state exhibit of an aerial photograph of the parking lot, which was not taken at night, yet refuse to let Thomas present evidence that would have completed the picture. The daytime picture could have mislead the jury as to the lighting conditions at night, so Thomas had the right to correct the impression it may have given. The jury view of the parking lot at night, under similar lighting conditions as existed on the night of the murder, would have assisted the jury in getting a more accurate picture of

the initial conditions that led Elvord to say Thomas drove the car while Davis raped and assaulted her.

This Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN DENYING THOMAS' MOTION TO SUPPRESS THE PHOTO SPREAD AND IN COURT IDENTIFICATION OF THOMAS AS ONE OF THE PERSONS WHO ATTACKED MONYE ELVORD, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

On page 62 of its brief the State says, "Moreover, unlike Green [Green v. State, 641 So.2d 391 (Fla. 1994)] police did not indicate that a suspect was in the array." That is incorrect.

> Q. Prior the Mr. Davis [the investigating police officer] coming over with the photographs, did he tell you that he had two suspects that he wanted you to look at the photographs about?
>
> A. Yes.
>
> Q. And so you were aware that the suspects' pictures were in one of these photo spreads, after you looked at --when you looked at them?
>
> A. We were--yes. Yes.

(15 R 654)

Letting Elvord know they had a suspect logically would cause her to believe that "one of the individuals in the lineup was the suspect, and such coaching has long been recognized by the courts as an important factor in determining whether a pre-trial lineup was impermissibly suggestive." Grubbs v. Hannigan, 982 F. 2d 1483, 1490 (10th Cir. 1993).

Such suggestiveness became more damning because she never gave a good description of the assailant who drove her car, and would know him only if she saw him (12 R 29-30). That was understandable considering she was very scared and noticed more the gun than her assailant (14 R 537, 564). C.f. Tomlin v. Myers, 30 F.3d 1235 (9th Cir 1994)(Ability to notice assailant's facial features affected by emotional state of victim.)

The State also claims that alln the men in the six photographs had similar characteristics. (Appellee's Brief at p. 62) That is also incorrect. None of them had an Afro haircut, and none of them had a similar complexion as Thomas.

By way of a footnote on page 61 of its brief, the State concedes there were two persons in the "Thomas spread who previously had appeared int he April 29 photo spread. . . Thomas does not explain how this circumstance makes the photo spread suggestive as to Thomas." In Grubbs, the court, found the photo spread lineup unnecessarily suggestive because "The second six-photo array viewed by S.S. contained four individuals who had facial characteristics noticeably dissimilar from those of the appellant and a fifth individual who had been seen by S.S. in a prior lineup." Id. at 1490. By including pictures Elvord had seen earlier and rejected as being one of her assailants, the police were in effect showing her a four or five person lineup, not one of six photographs of similar people.

When that limitation is coupled with them having told her they had two suspects they wanted her to look at, and the photos she examined had significant dissimilarities we must agree with the prosecutor's closing argument. "Maybe, you know, just maybe Detective Davis could have put together a little better photo spread. Maybe, just maybe, he could have had more guys that look like Robert Thomas." (20 R 1645)

There are no maybes about this issue. This Court should reverse the trial court's order denying Thomas' motion to suppress Elvord's identification of Thomas as one of her attackers.

ISSUE VI

THE COURT ERRED IN FINDING THE MURDER OF IMARA SKINNER TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, IN VIOLATION OF THOMAS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In Thomas' Initial Brief, Thomas argued that Skinner's murder was not especially heinous, atrocious, or cruel because 1. The victim had no prolonged awareness that he was doomed to die, and 2. Whatever the co-defendant's intentions were, they could not be imputed to him. In addition to addressing those points in its brief, the State has contended Skinner's death was HAC because of the depravities inflicted on Monye Elvord. (Appellee's Brief at pp. 70-71). None of its arguments withstand scrutiny.[4]

In support of its claim that the mental anguish Skinner endured during the hour or so he was driven around Jacksonville elevated his murder into one that qualified for this aggravator, the State cites four cases: Fennie v. State, 648 So.2d 95, 98 (Fla. 1994); Cave v. State, 476 So.2d 180 (Fla. 1985); Routly v. State, 440 So.2d 1257 (Fla. 1983); Banks v. State, 700 So.2d 363, 366 (Fla. 1997). In each of those cases, none of the victims were told that if they cooperated they would not

[4] The State does little to support the court's order that this aggravator applied, and for good reason. Most of it reflects the court's speculation about what happened inside Skinner's apartment. We know only that Thomas shot Skinner there. There is no evidence of what he was thinking, or whether the lights were on.

be killed. Instead, the prolonged kidnaping had only one inevitable conclusion-death, and they knew that. In Fennie, the victim stopped to pickup Fennie, who had flagged her down. He then forced her into the trunk of her car, drove her around for several hours collecting materials to kill her, and announced to others that he was not going to drown her, but planned to shoot her instead.

In this case Thomas never announced any plan to kill Skinner. To the contrary, he would be released if the couple cooperated with him. Moreover, the defendants drove them around Jacksonville looking, not for items to accomplish the victim's murder, but for money. Donaldson v. State, 23 Fla. L. Weekly S245 (Fla. April 30, 1998) (Assurances by the defendants that the victims were not going to be killed, and subsequent instantaneous murders were not HAC).

In Cave, the only reason Cave took the convenience store clerk 13 miles from the store was to kill her. She obviously felt the fear of her impending, inevitable death, and that prolonged terror made her murder (by stabbing and shooting) especially heinous, atrocious, or cruel. Indeed, as this Court noted "she was maneuvered or controlled by grasping her by the hair, that she suffered a defensive wound to her hand in attempting to avoid being stabbed, and that after being stabbed and falling to the ground show was executed by a single shot to the back of the head." Id. at 188.

In this case, there was no inevitability of death, and no cold determination to end Skinner's life. Instead, the circumstantial evidence shows that the victim could have surprised Thomas by lunging at him, and the latter shot more out of reflex than intention. Thomas' actions lack the shocking indifference to life present in Cave, and which this Court has consistently demanded for a death to be especially heinous, atrocious, or cruel.

In Routly v. State, 440 So.2d 1257 (Fla. 1983), Routly broke into the home of a Mr. Bockini, robbed and kidnaped him. He then put him in the trunk of the victim's car, drove him to a remote location, and shot him. In upholding the finding that the murder was especially heinous, atrocious, or cruel, this Court particularly noted "Mr. Bockini must have known that the defendant had only one reason for binding, gagging and kidnaping him." Id. at 1265.

In this case, Skinner knew for sure only that Thomas and Davis wanted money. Although they may have threatened him with death, that was conditioned on his failure to cooperate with them. Moreover, the victim was never bound, gagged, and thrown into the trunk of a car, strong indicators that death was inevitable.

In Banks, the Defendant killed his wife then sexually battered his ten-year-old stepdaughter for twenty minutes before murdering her. The child had

struggled and fought with Banks. The latter death was especially heinous, atrocious, or cruel, and is easily distinguished from the facts of this case.

The State uses Banks, however, to argue that the defendant committed the victim's murder in an especially heinous, atrocious, or cruel manner because the co-defendant sexually battered the co-victim. (Appellee's brief at p. 70). It also relied on Pooler v. State, 704 So. 1375, 1378 (Fla. 1997), and Henyard v. State, 689 So.2d 239, 254 (Fla. 1996) (Appellee's brief at pp. 70-71).

Thomas refuted that contention in his Initial Brief at page 69, relying on this Court's opinion in Archer v. State, 613 So.2d 446 (Fla. 1993). Admittedly Archer was absent from the murder scene when the co-defendant, Bonifay, killed the victim, but that fact has no controlling relevance to the holding that the murder was not HAC as to Archer. The key was that he did know how the murder was to be accomplished, so the aggravator could not be applied to him. Id. at 448.

Here, the State used Davis' heinous, atrocious, or cruel sexual assaults on Elvord to make Skinner's murder HAC. Even, if that were possible, this Court's holding in Archer precludes doing so here because there is absolutely no evidence Thomas ever intended Davis to rape Elvord. On the contrary, tired of Davis' efforts to have sex he told Davis "man just leave her alone. We'll drop her in the cemetery. Just leave her alone. " (15 R 610) The latter refused, and continued to

sexually batter her. If what the co-defendant does to a co-victim can make what the defendant does to the murder victim especially heinous, atrocious, or cruel, that law has no application here because Thomas had no intention for what Davis did to Elvord to transform the atrocity of a "normal" sexual battery into one that was especially despicable.

This Court need not reach that problem, however, because what Davis did to Elvord cannot make Skinner's murder HAC. Neither Henyard v. State, 689 So.2d 239, 254 (Fla. 1996), nor Cave v. State, 476 So.2d 180, 188 (Fla. 1985), which the State cites to support that contention, do. The facts of Cave are so obviously distinguishable from the situation here that it has no relevance to this resolving this issue. Henyard also has little pertinence because Henyard raped and tried to kill the victims' mother before brutally murdering her sobbing children. Likewise, Pooler has no significance because in that case there was only one defendant who, over two days, threatened to kill the victim, forced his way into her apartment, shot her brother as he fled, struck her in the head with the gun, dragged her to his car as she screamed and begged for her life, told her that "Bitch, didn't I tell you I'd kill you," and then did so. Shooting the brother, while a factor in making the murder HAC, was not crucial to that finding, and that aggravator would have applied without it.

Contrary to the State's argument, this Court has held that the atrocities a surviving victim endured do not quality the murdered victim's death as being HAC. In Riley v. State, 366 So.2d 19, 21 (Fla. 1979), the trial court used the "son's having to see his father's execution death" to justify finding this aggravator. Rejecting that logic, this Court said, "There was nothing atrocious (for death penalty purposes) done to the victim however, who died instantaneously from a gunshot in the head."

In this case, what Davis did to Ms. Elvord cannot be used to elevate Thomas' culpability of the Skinner homicide into one that is especially heinous, atrocious, or cruel.

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

ISSUE IX

THE COURT ERRED IN ALLOWING THE STATE TO ASK, DURING ITS CLOSING ARGUMENT, THE JURY TO SHOW THOMAS AS MUCH SYMPATHY AS HE SHOWED THE VICTIM AND RECOMMEND DEATH, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

We have here the same comments by a prosecutor from the same office this Court condemned in Shellito v. State, 701 So 2d 837 (Fla. 1997). In ISSUE II, Thomas objected to the prosecutor's tactic of deliberately creating a situation it must have known would have inflamed the jury. This issue merely highlights further improper acts by a prosecutor from a prosecutor's office that places victory over justice. That defense counsel never objected to the clearly erroneous argument, that the State on appeal admits was wrong (Appellee's brief at pp 75-76) should pose no procedural bar to insuring substantive justice in this case.

This Court needs to send a message to the State Attorney's Office for the Fourth Judicial Circuit that this Court will not tolerate persistent unprofessional prosecutions. It should, therefore, reverse, Thomas' sentence of death and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, the Appellant, Robert Thomas, respectfully asks this honorable court to either 1. reverse the trial court's judgment and sentence and remand for a new trial, or 2. reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to CURTIS M. FRENCH, Assistant Attorney General, at The Capitol, Tallahassee, FL 32399-1050; and by U.S. Mail to appellant, on this date, August 10, 1998.

Respectfully submitted,

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