W00A

047

FILED
SID J. WHITE
FEB 13 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,641

THE STATE OF FLORIDA,

Petitioner,

VS.

ALUDIN JAEL MATUTE-CHIRINOS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY CRIMINAL DIVISION

PETITIONER'S REPLY BRIEF

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida **33131**
PH. **(305) 377-5441**
FAX (305) 377-5654

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

CASES **PAGE**

CASES PAGE

OTHER AUTHORITY

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN REFUSING TO INSTRUCT THE JURY ON THE HAC AGGRAVATOR WHERE THE EVIDENCE PRESENTED WAS SUFFICIENT TO PRESENT A JURY QUESTION AS TO WHETHER THE HAC AGGRAVATOR APPLIED?

II

WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN REFUSING TO INSTRUCT THE JURY ON THE DURING-A-KIDNAPING AGGRAVATOR WHERE THE EVIDENCE PRESENTED WAS SUFFICIENT TO PRESENT A JURY QUESTION AS TO WHETHER THE KIDNAPING AGGRAVATOR APPLIED?

STATEMENT OF THE CASE AND FACTS

The State would point out that Defendant's seven-page dissertation on his alleged mitigating evidence, (Resp. B. 3-'7, 15-16), omits substantial evidence presented by the State tending to refute or minimize the mitigating value of it. More importantly, however, regardless of the validity of that evidence, it is wholly irrelevant to this proceeding, in which the sole issues are whether the trial court should give instructions to the jury on the HAC and kidnaping aggravating factors. The question is simply whether sufficient evidence exists to give the instructions, not whether there is evidence to the contrary or whether the evidence will ultimately support a death recommendation. The State therefore objects to this attempt to inject irrelevant matters into this proceeding, and urges the Court to ignore this "evidence" as the red herring that it is.

SUMMARY OF THE ARGUMENT

1. Defendant misunderstands the relevant standards regarding when a requested jury instruction should be given, relying on cases governing the granting of a directed verdict that have no application to the facts of procedures involved herein.

Applying the correct standards, the trial court clearly departed from the essential requirements of the law when it refused to give an instruction on the heinous, atrocious, or cruel aggravating factor where the evidence showed that the 2-year-old murder victim was nearly beheaded in her own bed by her father figure, where the wound rendered her unable to call for help, and where she would have suffered excruciating pain for three to five minutes.

2. The trial also court departed from the essential requirements of the law, as discussed in the initial brief, when it refused to give an instruction on the "during a kidnaping" aggravating factor where the evidence showed that the 2-year-old murder victim was confined against her will and against the will of her mother, and that the purpose of the confinement was to either terrorize the mother, with whom Defendant was having a domestic dispute, or to inflict bodily harm upon the child. Kidnaping for these purposes is not subject to the "slight or insubstantial" rule

of Faison. Moreover, the evidence also showed that the confinement was accomplished with an intent to commit a felony, i.e., murder. Although Faison applies to this aspect of kidnaping, the evidence showed that the confinement was not slight or inconsequential, was not inherent in the nature of murder, and made the crime substantially easier to commit, where the victim was locked in a room by a bolt substantial enough to withstand the repeated battering of two police officers and the confinement prevented the nine adults present from rescuing the child.

ARGUMENT

I.

THE EVIDENCE PRESENTED WAS SUFFICIENT TO PRESENT A JURY QUESTION AS TO WHETHER THE HAC AGGRAVATOR APPLIED.

In his answer brief, Defendant first asserts that the heinous atrocious and cruel (HAC) aggravator does not apply to the facts of this case because HAC does not apply where the murder is quick, where the Defendant did not intend prolonged suffering, or where the murder was committed in the heat of passion. The cases upon which he relies are all factually inapposite. Defendant also claims that the State has misstated the facts and law regarding HAC. To the extent deemed necessary, the State will address these claims, which are without merit. Finally, Defendant avers that the State has misstated the standards for the giving of jury instructions. Because it is Defendant who misperceives these standards, and because this misperception informs the remainder of his arguments, the State will address this issue first.

Legal Standards as to Jury Instructions

The State enunciated the proper standard for the giving of a jury instruction on an aggravating circumstance in its original brief: the question is whether there was competent and credible evidence presented in support of the factor. Banks v. State, 22

Fla. L. Weekly S521 (Fla. Aug. 28, 1997);' Hunter v. State, 660 So. 2d 244, 252 (Fla. 1995); Mordenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994); see also, Johnson v. Sinaletary, 612 So. 2d 575, 577 n.2 (Fla. 1993)(trial court has discretion to not give instruction on aggravator where it is "clearly unsupported by any evidence") (emphasis supplied). Defendant's argument that the State has misstated this standard confuses the issue presented. Defendant relies not on cases dealing with jury instructions, but on authority addressing the propriety of a directed verdict in the guilt phase of a trial. The situations are not analogous.

Accepting, arguendo, however, that directed verdict principles could be properly analogized to the penalty phase of a capital trial, the analogy is inapposite to the present. issues.. The granting of a directed verdict would not be the equivalent of the denial of a particular instruction, but would correspond to an order declaring that death is not a possible penalty. Such a declaration, however, is not within the authority of the trial court. State v. Donner, 500 So. 2d 532 (Fla. 1987); State v Bloom, 497 So. 2d 2, 3 (Fla. 1986).

Even accepting Defendant's premise, a directed verdict finds

---

[1] The State inadvertently cited Banks as being at page S52 in its initial brief. The correct citation is given here.

'chat a particular charge has not been sufficiently proven to send the ultimate issue, i.e., guilt, to the jury. The proper analog in the penalty phase would not be whether a particular aggravating circumstance had been proven, but whether the State had failed to present evidence establishing any aggravating circumstance. Under Section 921.141, Fla. Stat., if any aggravating circumstance is proven, the jury then has the duty of weighing the aggravating circumstance or circumstances against the mitigation presented by the defense, to determine the ultimate issue, whether the defendant should be sentenced to life or death. The denial of an instruction as to a particular instruction only prevents the jury from considering one circumstance of several in determining the defendant's sentence; it does not preclude it from recommending a sentence of death. Notably in this case, the trial court determined that the child-abuse aggravator applied, a conclusion Defendant has not challenged. Thus even were Defendant's theory applied, the court below did not order the equivalent of a directed verdict. Particularly under the circumstances of this case, where the court ruled that the sentencing issue would be sent to the jury, the better analogy would be to the denial of an instruction as to a particular element of a charge or defense. The standard for whether such an instruction should have been given is whether there is "any evidence" tending to support it. Campbell v. State, 577 So. 2d 932, 935 (Fla. 1991); Smith v. State, 424 So.2d 726,

732 (Fla.1982); see also State v. Essinosa, 686 So. 2d 1345, 1347 (Fla. 1996)(when state or defense requests instruction on permissive lesser included offense, instruction should be given unless "there is a total lack of evidence"). In any event, there really is no need to engage in Defendant's analogizing at all, given that the Court has already spoken on the relevant standard to be applied in the context under review, as noted above, which should be applied herein.

Defendant also asserts that the giving of an instruction that ultimately might be determined not to exist would violate his due process rights. However, the United States Supreme Court has recently rejected that very contention. Sochor v. Florida, 504 U.S. 527, 538 (1992); Johnson, 612 So. 2d at 577.

The State set forth the proper standards in its original brief; Defendant's claims to the contrary are thus without merit. Moreover, Defendant's legal and factual arguments appear to rest on his assumption that it must be determined whether the evidence establishes an aggravating circumstance beyond a reasonable doubt before the instruction may be given. As that is most assuredly not the case, his contentions would be of questionable merit even if they had some basis, which, as discussed infra, they do not.

Legal Standards as to HAC

Several of the cases Defendant cites for the proposition that HAC does not apply to "relatively quick murders," (Resp. B. 20), involved shootings after an altercation. Maggard v. State, 399 so. 2d 973, 975 (Fla. 1981)(defendant killed boss with single shotgun blast through window after employment disagreements); Kearse v. State, 662 So. 2d 677, 680 (Fla. 1995)(defendant shot police officer during altercation at a traffic stop); Burns v. State, 609 so. 2d 600, 602 (Fla. 1992)(same, single shot); Jackson v. State, 451 so. 2d 456, 459 (Fla. 1984)(defendant shot victim in the back during a drug-related dispute while both were riding in the backs seat of a friend's car), Others involved a "simple" shooting in the course of a robbery. Gorham v. State, 454 So. 2d 556, 557, 559 (Fla. 1984)(victim was shot twice in the back during a robbery, and there was no evidence that the victim knew he was going to die); Williams v. State, 574 So. 2d 136, 137 (Fla. 1991)(victim was a bank guard shot once in the course of a robbery).

The salient feature of all these cases is that the victims were shot during a brief transaction. As such there were no "additional facts that set [them] 'apart from the norm of capital felonies.'" Burns, 609 So. 2d at 606, quoting State v. Dixon, 283 so. 2d 1, 9 (Fla. 1973). Intuitively, it would seem that the killing of a 2-year old child with which the defendant had a

parental relationship by slitting her throat while she lay in bed is apart from the norm of capital felonies. Moreover, here there were such "additional facts" of the type this court has held sufficient to constitute HAC. First of all, this case was not a shooting; second, it was committed in the victim's bed; third, it resulted in the near-decapitation of the victim; fourth, the victim was a two-year-old child, and by nature, according to expert testimony, particularly fearful, a fact exacerbated by injuries that would have prevented the child from crying out for help; and fifth, there was expert testimony that the virtual beheading of the victim would have caused excruciating pain because the area of the injury contained a large number of nerve endings. The only case that Defendant cites that was not a shooting, was again, during a dispute, and without evidence of suffering. Elam v. State, 636 So. 2d 1312 (Fla. 1994)(defendant killed his boss by hitting him over the head with a brick during an employment dispute). Defendant's argument is most notable for what it does not contain: citation to any case in which this court has ever held that the stabbing of a victim in her own bed was not HAC. This is undoubtedly because it would be hard to envision a scenario where such a killing would not be heinous atrocious or cruel, given the trauma necessarily accompanying an attack in this most private of places. See Henvard v. State, 689 So. 2d 239, 254 (Fla. 1996)("fear and emotional strain may be considered as contributing to the heinous nature of

the murder even where the victim's death was almost instantaneous"); Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990)(HAC proper where victim was stabbed while sleeping or drunk in bed); Rolling v. State, 695 Fla. 278, 296 (Fla. 1997) (victim attacked in bed and conscious thirty to sixty seconds before dying); Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982)(where victim did not die "immediately" from single stab wound, the Court held that "although pain and suffering alone may not make this murder heinous, atrocious, or cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies, and sets this crime apart from murder committed in, for example, a street, a store, or other public place").

Defendant also asserts that this crime was not HAC because Defendant allegedly did not intend to cause prolonged pain and suffering. Again, the cases he cites are inapposite. See Cheshire v. State, 568 So. 2d 908, 910 (Fla. 1990) (death by single gunshot); Bonifay v. State, 626 So. 2d 1310, 1311 (Fla. 1993)(clerk shot during robbery): Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983)(single shot during robbery); Mills v. State, 476 So. 2d 172, 178 (Fla. 1985)(single gunshot); Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993)(shot during a robbery); Santos v. State, 591 So. 2d 160, 164 (Fla. 1991)(point-blank gunshots to head);

Tedder v. State, 322 So, 2d 908, 909 (Fla. 1975)(gunshot).

Further, Defendant's conclusion that these cases hold that HAC turns on the defendant's intent to inflict pain is questionable. This court has repeatedly observed that the relevant factor in determining whether HAC applies is not the defendant's state of mind, but the victim's. Banks v. State, 22 Fla. L. Weekly at S522 (under Cheshire, HAC factor considers the circumstances of the murder from the perspective of the victim, not the defendant); Henvard, 689 So. 2d at 255 n.6 (rejecting claim that jury should have been instructed on alleged "intent" element of HAC); Taylor v. State, 638 So. 2d 30, 33 n.4 (Fla. 1994)(same). Moreover, even to the extent that the cited cases can be read as Defendant reads them, they all, as noted, involved gunshot killings. Death by shooting is by definition not "apart from the norm of capital felonies." Robertson, 611 So. 2d at 1233 ("a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel"); Watts v. State, 593 So. 2d 198, 204 (Fla. 1992) (same); McKinney v. State, 579 so. 2d 80, 84 (Fla. 1991)(same); cf. Ponticelli v. State, 593 So. 2d 483, 489-90 (Fla. 1991)(distinguishing McKinney and Cheshire where "more than an ordinary shooting" was involved); Geralds v. State, 674 So. 2d 98, 103 n. 13 (Fla. 1996)(distinguishing Teffeteller by noting that

gunshot cases are qualitatively different from other types of killings). Thus, the inquiry in these cases into whether the defendant intended to inflict excessive pain was not because such intent is a sine qua non of HAC, but because if it is present, it can establish that there was some other factor that distinguished the murder from the "ordinary," non-HAC gunshot killing. As discussed above, however, this was not an "ordinary" gunshot killing. This was an extremely violent, painful, knifing of a two-year-old in the sanctuary of her bed.

Finally, Defendant conveniently parses the language on which the cited cases rely, focusing only on the Defendant's intent. The cases, however, go further:

> The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

Cheshire, 568 So. 2d at 912 (emphasis supplied); see also Kearse, 662 So. 2d at 686; Santos, 591 So. 2d at 163; Robertson, 611 so. 2d at 1233; Shere v. State, 579 So. 2d 86, 96 (Fla. 1991) (shooting not HAC where no evidence of defendant's indifference to victim's pain); cf. Rodriguez v. State, 609 So. 2d 493, 501 (Fla. 1992)(shooting was HAC because defendant's "utter indifference" to victim's pain set it apart from norm); Ponticelli, 593 So. 2d at 490 (same). There can be no doubt that when Defendant accosted

two-year old Lesly Melendez in her bed without provocation from her, and proceeded to virtually hack her head off, he displayed "utter indifference" to her suffering.

Defendant also contends that this murder was not HAC because it occurred in the "heat of passion." (Resp. B. 20). Again, he relies on gunshot cases. Cheshire; Santos; Porter v. State, 564 SO. 2d 1060, 1063 (Fla. 1990) (victims shot). Moreover, all those cases involved the killing of the person with whom the Defendant had the dispute. See also, Burns. Here, on the other hand, although the Defendant apparently was upset that the child's mother was considering leaving him, there was no evidence that they had discussed that issue within the two weeks preceding the murder. The only altercation here had taken place several hours before the murder-, and in no way involved the victim. Furthermore, none of these cases rested the rejection of HAC on the "passion" alone, but also on the nature of the killing by gunshot. As already discussed, the murder here was wholly different, involving a throat-slitting in bed.

Sufficiency of the Evidence

Defendant also challenges the sufficiency of the evidence cited in the State's initial brief to support the HAC factor. First, as noted above the question is not whether the evidence

established HAC beyond a reasonable doubt, but whether it was sufficient to go to the jury. Defendant's argument appears to ignore this distinctjon. A second, related, problem with Defendant's argument lies in his confusion of sufficiency with the weight that should be ascribed to the evidence, Neither this court, nor the trial court, at the charge conference stage, sit as finders of fact. Yet, much of Defendant's argument does not go to whether sufficient competent evidence existed for the instruction, but instead resembles a closing argument in which Defendant argues the inferences and weight that he feels should be ascribed to particular evidence. For example he faults the medical examiners testimony that children are especially fearful because, on cross examination she could not quantify the child's pain. (Resp. B. 32). This evidence was thus, Defendant says, speculative and inadmissible. The State, however, would defy anyone to put a number on pain. That it is not quantifiable does not mean that did not exist, as any human could attest. Nor does it render it speculative. Suffice it to say that the medical examiner did testify the child would have felt excruciating pain from being nearly decapitated, that she was conscious for at least 20 seconds,' and that it was well within the jury's ability to

---

[2] Assuming arguendo that Defendant's contentions that the State may not rely on the evidence that the victim continued to feel pain after she lost consciousness because it waived the issue at trial, and because such evidence is irrelevant and per se inadmissible were well taken, they do not alter the fact that even

determine whether this evidence would have qualified the crime as heinous, atrocious or cruel under a proper instruction.

Defendant's essential premise is that there was no evidence adduced below that separates this crime from the norm of capital felonies. He thus repeatedly asserts that the cases cited by the State are distinguishable, because some of them were even more horrible than the instant case. However, he wholly fails, as noted above, to cite any case with even remotely similar facts in which the HAC aggravator was stricken. The State has amply explained why this case is different from the norm of murders, and relies on its original brief in that regard.

For the foregoing reasons, and those set forth in the State's original brief, there was clearly "competent and credible evidence" warranting the giving of an instruction on HAC. As such, in granting Defendant's motion barring such an instruction, the trial court departed from the essential requirements of the law, and that portion of its order addressing the HAC aggravator should be quashed.

---

without this evidence, there was sufficient evidence to create a jury question as to HAC.

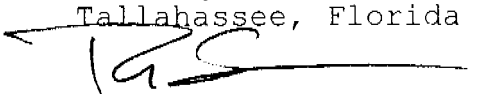
11.
THE EVIDENCE PRESENTED WAS SUFFICIENT TO PRESENT A JURY QUESTION AS TO WHETHER THE KIDNAPING AGGRAVATOR APPLIED.

Defendant posits nothing in his answer brief that was not raised below and refuted in the State's initial brief, upon which it relies. The State would note that Defendant again relies on a mistaken view of the relevant standards governing the giving of requested aggravating instructions, and in that regard would rely on its discussion of that question in Point I, *supra*. There was clearly competent and credible evidence supporting the kidnaping aggravator under either §787.01(1)(a)(2) or (3). As such, the refusal to instruct on the factor was a departure from the essential requirements of the law, and that portion of the trial court's order pertaining to the kidnaping factor should be quashed.

CONCLUSION

For the foregoing reasons, Petitioner, the State of Florida, respectfully requests that the portions of the trial court's order of September 2, 1997, granting Defendant's motion to prohibit the instruction of the jury on the HAC and kidnaping aggravators be quashed.

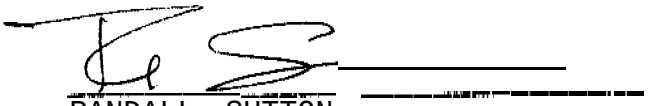
Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by U.S. mail to **LOUIS CAMPBELL,** Assistant Public Defender, counsel for Respondent, 1320 Northwest 14th Street, Miami, Florida 33125, this 10th day of February, 1998.



RANDALL SUTTON
Assistant Attorney General

F:\USERS\CAP COLL\RANDALL\AARDVARK\MATU5BR.WPD