IN THE SUPREME COURT OF FLORIDA

ANTHONY J. FARINA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 93,050
L.T. CASE NO,: 92-32105 CFAES

An appeal from the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida

REPLY BRIEF OF APPELLANT

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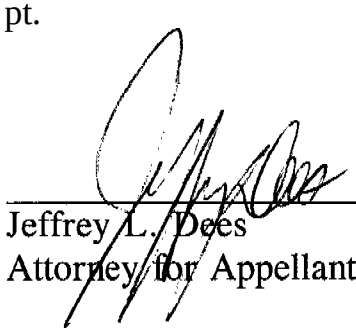

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STATEMENT OF FACTS

There is no testimony that the Appellant, Anthony Farina, directed, assisted or participated in his brother Jeffrey's shooting of Derek Mason, Gary Robinson, or Michelle Van Ness.

As to the manager, Kimberly Gordon, who was stabbed by Jeffrey after Van Ness and the others were shot, the testimony is in conflict. At one point in his testimony, Derek Mason indicated that Anthony held Gordon's head when Jeffrey stabbed her. (R. 9: 1271) However, Kimberly Gordon, herself, and Gary Robinson did not verify this. (TR.9: 1507; 10:1532,154607)

Gordon, the actual victim, testified as follows:

Q.: You don't know who stabbed you then?

A.: No, I do not.

Q.: You don't know how that was accomplished --

A.: No, I do not. (TR.9: 1507)

Kimberly Gordon's testimony indicates that the last time she saw the Appellant before Jeffery Farina began shooting, Anthony was by the cooler door walking away, which was 10 to 15 feet away from the freezer, where she and the other employees were located. (TR.9: 1506,1510,1514-1515) She testified as follows :

Q.: Do you remember previously testifying in November of 1992?

A.: Yes, sir.

Q.: Was your memory fresh then as to these events?

A.: Yes, sir.

Q.: Do you remember being asked this question? Page 83 of the transcript, who was doing the shooting.

A.: Jeffery.

Q.: Was Anthony present?

A.: He was by the door of the walk-in when I last saw him. Yes, sir.

Q.: Was your answer that you gave in November of 1992 an accurate answer under oath?

A.: Yes, sir.

Q.: And do you believe it to be true today?

A.: Yes, I do.

Q.: Now, can you estimate the time that it took once the first shot was fired until the last shot was fired, just the shots?

A.: Seconds.

Q.: Seconds?

A.: I would say within a minute. It was very quickly.

Q.: Very quickly. And the shooter was Jeffery Farina?

A.: Yes, it was.

Q.: Did you see that occur?

A.: Yes, I did.

Q.: Did you hear Anthony ever tell him to shoot anyone?

A.: No, not that I recall or heard.

Q.: Now, by the time the last shot was fired, you had turned your back and had put yourself into a lowered position?

A.: I was already turned. But, yes, I slumped, crouched.

Q.: You don't know who stabbed you then?

A.: No, I do not.

Q.: You don't know how that was accomplished --

A.: No, I do not. (TR.9: 1506-7)

She continued her testimony indicating that at the time Jeffery began shooting, Anthony was walking away:

Q.: You know the interview that I'm talking about with Allison Sylvester?

A.: Yes, sir.

Q.: Were you at that time asked, did you see who did the shooting; -and your response was, it wasn't Tony, because he wasn't there, I looked and he was walking in the walk-in door, so it was the other guy? Is that what you told her?

A.: Yes, sir.

Q.: Was that truthful when you said it?

A.: Yes.

Q.: Is it truthful today

A.: Yes, sir.

Q.: Do you remember being asked this question by Allison Sylvester during the same interview, he stepped out of the way, referring to Anthony; and your answer, he like left? Is that the response that you gave to her in May of 1992?

A.: What was the question?

Q.: About where Anthony Farina was at the time of the shooting?

A.: I can't recall.

Q.: But that's -- you don't recall saying those words to Allison Sylvester?

A.: I'm sure I did. But I can't recall. (TR.9: 1514-5)

The Attorney General misstates Gordon's testimony at Answer Brief, p. 7. She does not state two (2) people attacked her. (R.9:1488-89)

Gary Robinson did not recall Anthony Farina had any part in the stabbing of Kimberly Gordon. (TR. 10: 1532,1546-7) In fact, Robinson testified at the first

trial that he did not see Anthony Farina ever touch Kimberly Gordon during this incident :

Q.: Now, you remember testifying at the first trial; do you not?

A.: Somewhat.

Q.: Being asked questions by the attorneys at that trial?

A.: Yes, sir, I do.

Q.: Being under oath at that trial; were you not?

A.: Yes, sir.

Q.: Question, but he, meaning Anthony Farina, didn't touch Kim Gordon, did he? Your answer, this is page three fifty-three, not that I was aware of. Do you remember giving that answer?

A.: I may have at that time.

Q.: Was that an accurate answer under oath at that time?

A.: I believed it was.

Q.: Next question. You saw the stabbing occur, didn't you. Answer, yes, sir. Question, and as far as from what you saw, you didn't see Anthony assisting Jeffery physically in that attack with the knife, did you. Answer, no, sir. Wasn't that the answer that you gave in court at the previous trial while under oath?

A.: It may have been, sir.

Q.: You believed it to be true at that time?

A.: At that time I did.

MR. HATHAWAY: Thank you very much.
(TR. 10: 1546-7)

A close examination of the testimony of Derek Mason cited by the Attorney General' leaves it unclear if Mason actually saw the Appellant holding Kimberly Gordon's head down when Jeffery Farina stabbed her. Mason testified that Jeffery shot Gary first, in the chest, and then shot himself (Mason) in the jaw and tried to shoot him again in the chest, but the gun misfired. (TR.9:1271) Mason testified that after he was shot and blood began filling his mouth, he decided it was best to play dead, so he sat down on the floor and kept his head down:

Q.: At that point did you decide, well, he's trying to kill me, I better play dead? Do you recall what you were thinking at that time?

A.: Yes.

Q.: Could you share that with us?

A.: Share what with you? Yes, I did sit down.

Q.: Why did you lay down and do as you did?

A.: Well, I didn't want to just stand there and get shot again. I just sat down. I just played dead, I guess, you would say. I was just very still. (TR.8: 1280)

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[1]Answer Brief, p.5.

Mason continued by testifying that he was wearing a hat and kept his head lowered so as to cover his eyes from view during the remainder of the incident:

> Q.: You kept your eyes down, didn't you?
>
> A.: I kept my head down I had like a cap on with a brim and everything, so that they were standing up, they couldn't see my eyes. My eyes were open. I was sitting down waiting for them to leave. (TR.8: 1286)[2]

[2]See pages 30-31, infra.

ARGUMENT

POINT ONE: THE JURY SELECTION ISSUE.

The Attorney General argues that the Appellant ultimately accepted the jury without renewing his challenges to the peremptory strikes at issue. (Answer Brief, p. 22) On the contrary, the trial transcript reveals that although the lower court went through the process of winnowing out a panel of 12 trial jurors and two alternates, it never concluded the process by asking if the parties accepted the jury so constituted, and the Appellant never stated that he did. (TR.9: 1149-1152) The Attorney General's argument and citation to TR.7: 1149 is both misleading and incorrect, because there the lower court was only dealing with whether the Defendants had any objections to the two alternate jurors.

The trial court thereafter rushed through final preliminary matters before opening the trial. (TR.9: 1152-1158) In fact, the defense attorneys had to struggle to renew any objections prior to the taking of evidence. (TR.9: 1158) The court acknowledged that there was a timely renewal of motions at the end of jury selection. Id.

As a result, the implicit waiver of objections found by the courts in the Hudson and Joiner cases cited by the Attorney General (Answer Brief, p.22) is not applicable.

On the merits, the Attorney General argues that juror Edwards maintained that her son was not guilty of the crime of which he was convicted, and therefore the State's exercise of peremptory challenge was race-neutral. (Answer Brief, p. 24) However, the Attorney General, omits the voir dire by the court where juror Edwards clearly stated that she was satisfied with her son's conviction, "but the outcome, I think, was pretty reasonable. He was in a group he had no business being in." (TR. 1:75-76) She was unequivocal that the justice system in North Carolina did not malfunction when her son was convicted and that his case was handled properly. Id.

As to juror Hilton, the reasons asserted by the State to strike her (that she was 40 minutes late to court and might allow feelings of Christian forgiveness to creep into her decision) are not supported by the record. Under questioning by the State Attorney, she indicated no hesitancy in being able to apply man's law and separating that from Christian beliefs:

> Mr. Tanner: Alright. Will you be able to do that? I know you are a religious person. Will you be able to look in this case and these men under man's law, because that's what we are dealing with here today?
>
> Ms. Hilton: Yes.
>
> Mr. Tanner: And you might forgive them as a Christian, but you would still hold them to man's law?

Ms. Hilton: Yes.

Mr. Tanner: Thank you. (TR.5:777)

In Overstreet v. State, 712 So.2d 1174 (Fla. 3rd DCA 1998), although the State's proffered reason for striking a black juror was race-neutral on its face, other circumstances surrounding the strike made it clear that the State's proffered reason was disingenuous and pretextural. Id., at 1177. In that case, the State made only a cursory examination of the juror and accepted another juror who had expressed similar uncertainties. Further, it appeared that the State was successful in camouflaging the pretextural nature of the strike because of the lower court's faulty recollection of the responses given during voir dire. Id.

The district court noted that this Court had adopted a non-exclusive list of five factors to guide the trial bench in its evaluation of whether a proffered reason for a strike is in fact an impermissible pretext, quoting from State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). One of those factors is, "the prosecutor's reason is unrelated to the facts of the case. "

In the case at hand, the State's proffered reasons are unrelated to the actual facts revealed on voir dire. Further, the lower court completely failed to examine the reasons and all the circumstances surrounding the strike, including the actual answers given by the juror on voir dire, as it is required to do in order to

determine whether the proffered reasons are "genuine" under step three in Melbourne v. State, 679 So.2d 759 (Fla. 1996). The lower court applied the wrong standard, indicating its only duty was to subjectively evaluate the State's "good faith." (TR.7:1126)[3] The same was true for juror Edwards. (TR.7:1103-1106) The Appellant submits that in such cases, the asserted reason is not genuine and the peremptory strike is pretextural where the challenged juror is a member of a protected minority, the basis of the strike is an erroneous recitation of the voir dire testimony, and the trial court fails to critically examine the reasons in light of the circumstances and actual testimony . Overstreet .

POINT TWO: THE "POST-ARREST STATEMENT" CLAIM.

The Attorney General's argument that the Defendants post-arrest taped statements were properly admitted during the re-sentencing proceeding simply because they were properly admitted at the original guilt phase proceeding is unsupported by law. In fact, there is no reason to admit evidence that is clearly improper in a penalty phase before a fresh penalty phase jury simply because the same evidence had been properly admitted at another time before another jury in the guilt phase.

[3]The lower court did this even though it recalled that juror Hilton "clearly indicated she could follow the law. " (TR. 7: 1124)

The Appellant's statement was relevant to guilt, but not to the penalty phase, where guilt was not an issue. The evidence was highly prejudicial, as well as a potential non-statutory aggravating factor, as in Derrick and Kormondv cited in the Initial Brief (pp.36-9). Thus, the Appellant can show prejudice in the penalty phase which is before this court for review.

The Attorney General does not argue that this evidence was relevant to any statutory aggravating factor. The only issue is thus whether this evidence was proper to familiarize the re-sentencing jury with the "nature of the crime." §92.1141(1), Fla. Stat.; Wike v. State, 698 So.2d 817, 821 (Fla. 1997).

The Attorney General relies upon Teffeteller v. State, Lawrence v. State, Bonifav v. State, and Wike v. State, all resentencing cases .[4] In Teffeteller, the trial court allowed the State to introduce testimony of several witnesses concerning the victim's murder and one photograph of the victim, The Supreme Court expressly noted "this evidence was not used to re-litigate the issue of Appellant's guilt, but was used only to familiarize the jury with the underlying facts of the case. " 495 So.2d at 74. The defendant argued on appeal that the photograph was prejudicial because not relevant to aggravating or mitigating circumstances. The Supreme Court quoted Section 92 1.14 l(l) that permits evidence as to any matter

[4]Answer Brief, p. 27.

the court deems relevant to the nature of the crime and held the photograph fit within the purview of the statute.

That is not so in the case at hand. This evidence re-litigated the guilt of the Appellant and was not any part of the underlying facts of the murder committed on May 8, 1992. The Appellant's statements were about what did not happen that day and were made two days after the fact while in custody following his arrest for the victim's murder.

In Lawrence v. State, the State introduced previous trial testimony of one Sonya Gardner which "recounted the events surrounding the murder for which Lawrence was convicted. " 69 1 So.2d at 1073 .[5] The Supreme Court upheld this as being evidence to familiarize the jury with the facts of the case, citing Teffeteller. Id., at 1074 (n.7). It also established for the defendant almost all of his mitigating evidence. Lawrence does not support the admission of after the fact statements of the Appellant in this case.

In Bonifay v. State, the trial court allowed the State to present evidence that after being shot two times, the victim begged for his life just before the defendant fatally shot him two more times. The defendant argued on appeal that this was

[5]At the defendant's first trial, Sonya Gardner testified she had been with Lawrence and another person when they went to a convenience store to rob it, although she did not enter the store. She testified the defendant confessed killing the victim to her. 614 So.2d at 1094.

irrelevant and superfluous. The court held this was relevant evidence to explain to the jury the facts surrounding the murder, thus enabling it to make an informed decision, citing Teffeteller . 680 So.2d 4 19. Again, that is not the case now before the court. The Appellant's statements were not part of the facts and circumstances of this murder as it occurred and was not a confession to murder. It was an after the fact, post-arrest statement and related things that did not occur.

In Wike v. State, the State presented evidence the defendant kidnapped two sisters, ages 6 and 8; took them to a remote area; bound them; raped the older girl; then took both children deeper into the woods where he attempted to kill each by cutting their throats; however, the older sister survived. The defendant objected that the evidence of what he did to the older sister was prejudicial and irrelevant. The Supreme Court held it was proper evidence relating to the "nature of the crime" and was not used to re-litigate the defendant's guilt, but only to familiarize the jury with the underlying facts of the case, citing Teffeteller and Bonifay, 698 So.2d, at 821.

Again, that is not the case at hand before the court. The Appellant's statements only re-litigated the issue of his guilt, which was not relevant. The statements fell within the proscriptions of Kormondv and Derrick against evidence of lack of remorse or non-statutory aggravating circumstances and are not within

the evidence allowed by Teffeteller, et al., and Section 921.141(1). See also Carrillo v. State, 24 FLW D487 (2nd DCA, 2/19/99) (holding the trial court erred in admitting statements made by defendant at time of arrest in which he called the victim a bitch and stated if he was going to jail he might as well kill her.)

POINT THREE: THE DENIAL OF THE MOTION TO SUPPRESS STATEMENTS CLAIM.

The Attorney General relies upon Harvard v. State, 414 So.2d 1032 (Fla. 1982).[6] However, that case did not hold the defendant could not litigate issues in re-sentencing proceedings that could have been raised during the first trial, as argued by the State. In Harvard, finding a Gardner violation, the Supreme Court had remanded only for the limited re-sentencing purpose of allowing the defendant the opportunity to explain, rebut or argue the relevance and importance of confidential information relied on by the trial court. On appeal, the Supreme Court ruled the trial court had sufficiently permitted the defendant to rebut or argue this evidence, and in fact allowed the defendant to go beyond that sole purpose of the re-sentencing proceeding.

The Attorney General asserts the Appellant knew of these new grounds prior to the first trial. (Answer Brief, p. 30) The record shows that the grounds for the Appellant's motion in the case at hand were based upon new evidence obtained in

[6]Answer Brief, p. 29.

depositions of police officers after remand for the new penalty phase. (PTR:553) The State cites no record authority for its argument.

The Attorney General argues that permitting motions to suppress evidence in the re-sentencing phase "flies in the face of any concept of orderly litigation." (Answer Brief, p.30) However, he cites no authority. In fact, the law is the opposite. State v. Tamer, 475 So.2d 918 (Fla. 3d DCA 1985) (trial court had power to grant motion to suppress after remand on grounds other than those reviewed on direct appeal).

In Spaziano v State, 433 So.2d 508, 511 (Fla. 1983), the Supreme Court permitted the trial court to consider new evidence establishing a new aggravating factor (prior conviction of a violent felony), despite the fact that the trial court had excluded the evidence at the first sentencing proceeding. The Supreme Court held in a re-sentencing proceeding, the lower court is not bound to follow prior rulings of law that were erroneous.

In Mann v. State, 453 So.2d 784 (Fla. 1984), the Court held when a case is remanded for a new sentencing proceeding (that is not just a re-weighing proceeding), both sides may present new evidence. These holdings and the clean

slate rule[7], imply the trial starts anew as to all re-sentencing issues, both factual and legal.

This conclusion is consistent with settled law as to procedure following the grant of a new trial. Rule 3.640, Fla.R.Crim.P., states:

> When a new trial is granted, the new trial shall proceed in all respects as if no former trial had occurred [except that a defendant may not be retried for a greater offense if convicted of a lesser one].

In Bell v. State, 699 So.2d 674 (Fla. 1997), the court held that the trial court's rulings did not become the law of the case or collaterally estop a successor judge from entering contrary rulings in criminal cases where the defendant was granted a new trial. In Bell, the previous trial judge had ordered the exclusion of evidence against the defendant, i.e., testimony of the defendant's husband and allegations that alleged similar fact evidence. When a new trial was granted, a successor judge reversed both rulings and the State was allowed to use the previously excluded evidence in the new trial. The 5th District held this was not error, holding that the grant of a new trial meant that "the previous rulings were subject to review by the successor judge. .the successor judge, or the prior judge if still assigned, could entertain the objections and enter orders which were the opposite to the prior rulings. " Id, at 1035; citing Fla.R.Crim.P., 3.640(a) and

[7]Initial Brief, p. 44, citing Preston v State, 607 So.2d 404 (Fla. 1992).

State v. Strong, 593 So.2d 1065 (Fla. 4th DCA) rev. den. 602 So.2d 942 (Fla. 1992).

The Appellant's motion was proper because it was solely directed to evidence the State intended to use against him in the new penalty proceeding and the motion alleged the evidence was secured in violation of the Constitution of the United States and the State of Florida. Such evidence is expressly inadmissible in the penalty phase. Section 92 1.141(1), Florida Statutes (1998). The Defendant's motion was not directed to the guilt phase, and obviously, the Defendant's motion could have no effect on guilt because his conviction was affirmed. Moreover, this issue had not been decided in the prior appeal. State v. Tamer, supra.

POINT FOUR: THE DENIAL OF THE MOTION TO SEVER CLAIM.

The Attorney General argues that the co-defendant's statements were properly admitted in the resentencing proceeding because they were previously admitted in the guilt phase. (Answer Brief, p. 32) This argument is incorrect, as set forth at Point Two above. This evidence was improper because it did not advise the jury of the underlying nature of the crime and was not related to any statutory aggravating circumstances.

The Attorney General again relies upon Harvard v. State. Id. That case is not applicable, as set forth in Point Three above. The Attorney General's

argument that this amounts to re-litigation is erroneous because (a) the issue was properly raised on remand during the re-sentencing proceeding and (b) had not been decided in the first appeal.

The Attorney General argues that the trial court found that the Appellant was a major participant "in the murder" of Van Ness. (Answer Brief, p. 33) This is incorrect. The trial court actually held that, while the Appellant was "a major participant in the crime [i.e., the robbery] ", he was only an "accomplice to the capital felony committed by Jeffery Farina and his participation was minor. "

POINT FIVE: THE "VICTIM-IMPACT" EVIDENCE ISSUE.

The State argues that this court's prior opinion in the Appellant's case which allowed victim-impact evidence on remand justified the lower court's denial of the Appellant's motion to exclude this evidence. (Answer Brief, p. 34)

However, the Appellant submits that the victim impact testimony presented by the State failed to "[comport] with the decision in Payne v. Tennessee", as well as Windom v. State, 656 So.2d 432 (Fla. 1995), and Burns v. State, as required by this court's opinion in the Appellant's case. 679 So.2d at 1158.

The Attorney General argues the evidence did not become a feature of the trial. (Answer Brief, p. 35) The Attorney General does not dispute that out of 19 witnesses called by the State below, 12 were purely victim-impact witnesses only

(family and friends, not witnesses to the crime) and that out of the two and a half total days the State took to present its case, approximately a day and one half was devoted solely to the victim-impact testimony of these witnesses. Stated in percentage terms, as the Attorney General seems to prefer, 63% of the State's witnesses and over 50% of the time the State used to present its case, was devoted solely to victim-impact evidence.

The Attorney General argues, nevertheless, that this was only 6% of the total pages of the transcript from opening statement to final argument. (Answer Brief, p. 35-36) However, the State's entire case, including direct and redirect evidence, took 222 pages'. The 67 pages of victim-impact testimony contained therein equals 30 % of the State's case solely in terms of pages of transcript.

By any statistical measure, 63 % , 50% or 30%, the victim-impact testimony was a feature of the State's case. This was not a "quick glimpse" of the life of the victim envisioned by the court in Payne. 111 S .Ct. at 2611.

The excessive emotional, repetitive and inflammatory nature of the actual testimony given fails to comport with Payne v. Tennessee, because it was so "unduly prejudicial that it renders the trial fundamentally unfair" in violation of the due process clause in the Fourteenth Amendment. 501 U.S . at 825. The unduly

*Excluding cross-examination (which was virtually non-existent) and legal arguments on objections or motions.

extensive nature of the witnesses elaboration of their feelings of loss can also fairly be said to have crossed over into impermissible characterizations and opinions about the crime excluded by Payne. 501 U.S. at 830.

The trial court failed to limit, exclude or properly instruct the jury over the Defendant's objections, The State has failed in its burden to show that the error in the admission of this highly volatile and inflammatory evidence was harmless beyond any reasonable doubt.

POINT SIX: HEINOUS, ATROCIOUS AND CRUEL.

Several of the lower court's findings reference this factor are not supported by the evidence:

1. There is no testimony that Van Ness "begged for her life."

2. The evidence did not show the Appellant did anything to inflict "extreme terror and mental torture" upon Van Ness. The evidence showed none of the victims were treated abusively or rudely. They were assured more than once that no one would be hurt if they all cooperated. They knew this was a robbery. They were offered cigarettes by the Appellant and allowed to smoke. No one was beaten, raped or assaulted physically or verbally at any time. The other victims even assured Van Ness she would be okay. The Appellant did not shoot anyone. The shooting was done quickly, "within seconds", without warning and without any verbal or physical abuse. No one was transported away from the scene and executed.

3. The trial court's finding that Van Ness cried "knowing she was going to die" and that she "contemplated her death" are not in

the evidence and are impermissible speculation. Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1976).

The Attorney General argues that Henyard v. State, is similar to the case at hand. (Answer Brief, p. 39) In that case, two children were killed after they saw their mother raped and then shot by the defendant and an accomplice. The children and the mother had been previously kidnapped from a store parking lot. After the mother's death, the defendant drove the two children to another location. The children were crying for their mother, who had already been shot. The defendant then stopped the car and took the children a distance off the road and shot and killed both of them. The Supreme Court upheld that finding of HAC based on all the facts. The delay in shooting the children after the apparent raping and murder of their mother, and the anguish they endured during this time while being transported to a different scene where they were shot, distinguishes Henyard from this case. There was no such delay or apprehension here, much less any rape or assault on any of the victims preceding the shootings.

This case is most closely like Donaldson v. State and Robinson v. State cited in the Initial Brief, pp. 71-2, where the victims were reassured they would not be hurt, where the fatal shot was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence of intent "to cause the victim unnecessary and prolonged suffering. " Robinson, 574 So.2d at 112.

POINT SEVEN: COLD, CALCULATED AND PREMEDITATED.

The trial court's sentencing order confuses CCP with witness elimination. It further confuses a plan to rob versus a plan to kill, and its finding that there was a plan to kill and that the death of witnesses was understood prior to the robbery is not supported by the evidence. It is improper for the trial court in a sentencing order to use the "same aspect" of the crime to support two aggravating circumstances. Provence v. State, 337 So.2d 783 (Fla. 1976); Rilev v. State, 366 So.2d 19 (Fla. 1978).

Bell v. State cited by the Attorney General in the Answer Brief is not on point. (Answer Brief, p. 43) In Bell, the defendant specifically told people in advance he was planning to commit murder (not robbery). Significantly, the Attorney Generally specifically deleted this fact from his lengthy quote from the opinion on page 43 of the Answer Brief, where the Supreme Court said as follows:

> Our review of the record shows that Appellant [Michael Bell] told several people he planned to kill Theodore Wright, and he purchased a gun for that purpose. 699 So.2d at 677.

The facts of that case show that Wright had killed Bell's brother, Lamar, several months earlier in self defense:

> During the five months following Lamar Bell's death, Michael Bell repeatedly told friends and relatives he planned to kill Wright. On December 8, 1993, Mr. Bell, through a girlfriend,

> purchased an AK-47 assault rifle, a 30 round magazine, and 160 bullets. 699 So.2d at 675.

The very next night, Bell located Wright's car outside a lounge and then killed Wright's brother and a girlfriend with the AK-47 when they entered the car. Bell then sprayed bullets into the front of the lounge they had exited, where about a dozen people were waiting to go inside. Bell drove to his aunt's house and said to her, "Theodore got my brother and now I got his brother." Id.

The Attorney General also relies upon Jones v. State. (Answer Brief, p. 45) In Jones, the defendant had purchased a car from the victim, a car dealer. When the engine blew up, the defendant struck a deal with the victim, who would have the repairs made in return for $1,200 to be paid by the defendant. When the car was repaired, the defendant knowingly gave the victim a worthless check for $1,200 in order to obtain possession of the car. When the victim found out the check had bounced, he had his 22 year old daughter call the defendant to come in and make the check good. The defendant came with a pistol. He first shot and killed the daughter in the bathroom at the car lot. He then went and shot the victim in his office. The defendant took the papers for his car from the victim's desk and fled the scene. The court found the plan to kill based upon the defendant's coming to the scene with a firearm and without any cash. This was clearly not a case of a planned robbery, during which a co-defendant shoots the

victims, as in the cases cited in the Appellant's Initial Brief, pp. 75-76. The Jones case is more akin to Bell, cited above, where murder was the only crime planned, and thus is not similar to the Appellant's case at hand.

The Attorney General also cites Franqui v. State. (Answer Brief, p. 45). In Franqui, there was clear evidence the defendants planned to murder the victim, Lopez, (a bodyguard) at the outset of a planned robbery. The defendants were aware that one Cabanas had a procedure for withdrawing substantial cash sums from his bank to fund a check cashing business, and that Lopez followed him in a truck as an armed escort. After Cabanas withdrew $25,000, he left the bank in his vehicle followed by Lopez. The Defendant and accomplices blocked their path in the street with the defendant's vehicles. The defendant and accomplices exited and immediatelv began firing bullets into the Lopez and Cabanas vehicles, killing Lopez. Specific testimony by an accomplice at trial set forth that Franqui had planned to immediately murder the bodyguard to facilitate the completion of the robbery of Cabanas. 699 So.2d at 1324.

There is no such testimony in this case. No witness testified that Anthony Farina and Jeffery Farina had pre-planned to murder the Taco Bell employees during the robbery. Dr. Levin, the Appellant's psychiatrist, testified that Jeffery had previously asked the Appellant about whether to kill any one, but there was

never any plan made to do so. (TR. 13 :214 1) The same testimony was given by Jeffery Farina's psychologist, Dr. Harry Krop, (TR. 13:2087-2095) who testified Anthony Farina did not want to kill and did not plan to kill anyone. Id.

The Appellant testified that only a robbery was planned, as a means to obtaining money to help him get his children out of the environment they were living in. (TR.2474-6) Jeffery Farina purchased a firearm for reasons unrelated to the robbery. Id.[9] After the robbery was complete and everyone was tied up, Jeffery Farina brought up whether to shoot any one, just as Anthony was ready to leave. (TR.2491) The Appellant did not tell Jeffery to shoot or kill anyone; Jeffery Farina decided to do this on his own. (TR.13:2094-95;TR.2493-8,2525)

There is no other testimony on this issue. Moreover, unlike Franqui, when this robbery started, no one was killed; everyone was tied up according to the plan. If a plan to kill had been formulated, the killing would have happened first. The lower court and the State cannot justify the finding of CCP on the absence of

[9]The Appellant testified his brother had purchased the firearm while the Appellant was gone from the State to pickup his girlfriend and their child. Id. During that interim, Jeffery had attempted suicide with it because he felt like he was failing his family's need for financial assistance. Testimony by Tina O'Neil. (TR. 12: 1894-96). Dr. Krop also testified that Jeffery's purchase of the firearm was unrelated to Appellant's robbery plan, but instead for his own protection or possible suicide. (TR. 13:2087-89)

such critical evidence. This case is more akin to Geralds, Barwick and Wyatt, cited in the Initial Brief at page 75.

In Eutzy v. State cited by the Attorney General (Answer Brief, p. 45) there was again the complete absence of any evidence that the murder of a cab driver was done in the commission of a robbery or any other felony. No money was taken or anything else of value, and no plan to commit any robbery was proven. The only conclusion supported by the evidence was that the defendant in Eutzy simply intended to commit premeditated murder in advance of entering the cab. Again, that is not the case now before this court.

In this case there is insufficient evidence of (1) a "careful planned or prearranged design to kill" and (2) "heightened premeditation" to kill on the part of Anthony Farina, as required to justify CCP. See Jones v. State, supra, at 571.

POINT EIGHT: THE AVOID-ARREST/WITNESS ELIMINATION FACTOR.

This factor focuses on the motivation for the crimes. The Attorney General relies on Jennings v. State and Rilev v. State. [10] Witness elimination must be the "sole or dominant motive" for the killing and "mere speculation by the State that it was" cannot support this factor. Jennings, 718 So.2d at 151. ["P]roof of the

[10] Answer Brief, pp. 46-47.

requisent intent to avoid-arrest and detection must be very strong in these cases." Riley, 366 So.2d at 22.

In Jennings, the victims all knew and could identify the defendant, who was the killer. The court wrote however, that fact alone is insufficient to prove the avoid-arrest aggravator . The court relied on further evidence that the defendant used gloves, no mask[11], and previously stated if he committed a robbery, he would not leave any witnesses and indicated he would cut their throats. There was also direct testimony that the Defendant disliked one of the victims, a former co-worker, for holding him back when he had worked with her at the restaurant. Id.

In Riley, the defendant executed two bound and gagged victims during a robbery by shooting each in the head with a pistol. One of the victim's knew the defendant well and could identify him, and the defendant shot the victims after a co-defendant expressed concern for subsequent identification.

In the case before the court, the Appellant did not state before or during the robbery that these witnesses should be killed to avoid arrest and detection. The Appellant did not tell Jeffery that he should kill the victims or that it was a good idea. (TR.9: 1507)

[11]The trial court found the defendants' had masks available in their truck, but intentionally disdained to use them.

Further, the defendants in this case did not make sure everyone was dead before they left. In fact, no one was dead when they left: the two males were awake and sitting up; Van Ness was unconscious; and Kimberly Gordon was yelling and coughing. (TR.8: 1272)(TR. 10: 1532) The two male employees quickly untied themselves and called the police within minutes after the defendants were gone. (TR.8: 1272) Three of the four employees survived and were released after brief hospital stays. Van Ness died two days later.

POINT NINE: THE PROPORTIONALITY CLAIM.

Several of the conclusions of the trial court quoted by the Attorney General (Answer Brief, p. 49) are unsupported by the evidence: The evidence is unclear who bought the bullets; there is no evidence that the Appellant stood beside Jeffery Farina and held the gun when Jeffery stabbed Kimberly Gordon; the lower court is also incorrect by writing that Jeffery Farina killed Kimberly Gordon. The lower court's interpretation that the victims were herded into the cooler for execution is not supported by the direct testimony. Its characterizations of the Appellant's words "your call" as being approval to Jeffrey Farina to begin the killing is not supported by the testimony. Dr. Krop, Jeffrey's psychologist, testified that Jeffrey made the call by himself. (R. 13 :2095)

As pointed out in the statement of facts above, only Mason claimed that the Appellant held Kimberly Gordon's head down while Jeffery tried to stab her, but it is not clear he actually saw that. That scenario does not make sense. The obvious risk to Anthony Farina's hands if holding Gordon's head while Jeffery is pounding it with a knife, renders this unlikely. Significantly, Gordon, herself, and Gary Robinson did not verify the Appellant played any role. Robinson saw Jeffery Farina stab Gordon in the back of the head, but did not see Anthony Farina holding her down. (TR. 10: 1548) Gordon did not know at all who stabbed her or how that occurred. (TR.9.1507-1508)

The Attorney General misconstrues the lower court's sentencing order (Answer Brief, p. 49,51) where the trial court wrote as follows:

> The Defendant was an accomplice in the capital felony committed by Jeffery Farina and his participation was relatively minor. The facts are as stated above. The court finds that Anthony did not fire the shot that killed Michelle Van Ness, but that his participation in the crime was major.
>
> (DR:358)

The Attorney General asserts that the "crime" referred to in the last sentence quoted above, means murder. (Answer Brief, p. 49,51) That interpretation leads to an absurd result, i.e., that the trial court found in the first sentence that the Appellant was a minor participant in the capital felony committed by Jeffrey

Farina, and then immediately contradicted itself in the next sentence by declaring that the Appellant was a major participant in the same capital felony.

It is clear that the trial court meant that the Appellant was a major participant in the robbery, i.e., the "crime", but only an accomplice in the murder committed by Jeffery and that the Appellant's role in the murder was minor. To hold otherwise would have the trial court both find and not find this mitigating circumstance. Obviously, the trial court found the mitigating circumstance did apply to the Appellant, but then chose to give it little weight.

The Attorney General quotes from Jennings in support of his proportionality argument (Answer Brief, pp.50-51), but omits from his quotation the most significant aspect of the court's analysis on this issue:

> We have independently reviewed the evidence in the present case, ***see Parker v. Dugger, 660*** So.2d 1386 (Fla. 1995), including Jennings' inculpatory statements made to law enforcement personnel, his ownership of the murder weapon, and his bloody shoeprints leading from the murder scene. The evidence also includes general testimony relating not only to Jennings' dislike of Cracker Barrel and Siddel, but also his past statements about committing a robbery and not leaving any witnesses. We conclude as a matter of law that the evidence is sufficient to support Jennings' murder convictions, 718 So.2d at 154.

Those facts are markedly different from the Appellant's case. The Appellant did not kill anyone, did not own the murder weapon, did not dislike Van Ness,

and did not make prior statements about committing a robbery and leaving no witnesses. The Appellant submits that Jennings is completely inapposite to this case.

On the Enmund/Tison issue, the Attorney General misconstrues the trial court's sentencing order by arguing that although the lower court wrote the Appellant was an accomplice and a minor participant in the murder committed by Jeffery Farina, he was nonetheless a major participant in the same capital felony, i.e., because the trial court meant "murder" when it wrote "crime". (Answer Brief, p. 49,51) This renders the lower court's sentencing order nonsensicle, as shown above. The Attorney General does this in order to claim that DuBoise v. State is applicable precedent. Id.

However, DuBoise presents a significantly more aggravated factual scenario. In that case, DuBoise and two accomplices abducted a woman to rob and rape her. DuBoise actually raped the victim while one accomplice struck her with a piece of lumber; the accomplices then raped her and following that, beat her to death. While so engaged directly with the victim, DuBoise did not try to stop the accomplices from either raping her or beating her to death. That beating also must have taken some time.

The Appellant did not assault or have any direct engagement with Van Ness. He was not standing by her as Jeffery Farina shot her, nor did he direct or assist Jeffery to do so. Nor was Van Ness beaten, raped or abused by Jeffrey. Jeffery shot her quickly, once to the head. She immediately fell unconscious. Jeffery did not bother her further, nor did the Appellant do anything to her.

In Tison, the Supreme Court explained what is required to impose a death penalty upon an accomplice who does not kill and does not intend to kill, which this court quoted with approval in DuBoise:

> The court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorized the death penalty in a felony murder case where, though the defendant's mental state fell short of intent to kill, the defendant was a major actor in a felony in which he knew death was highly likely to occur" * * * and that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement" . 520 So .2d at 265, quoting from 107 S.Ct. at 1686, 1688.

The trial court found as mitigation that the Appellant was an accomplice to her murder by Jeffery Farina, and that the Appellant's role was minor. The lower court did not fmd that the Appellant exhibited a reckless indifference to her life. The facts do not support such a finding. The Appellant had no plan to murder before or during this robbery. Clearly, Jeffery brought it up on his own and acted independently.

The Appellant submits that the lower court improperly found the aggravating circumstances of HAC, CCP and also avoid-arrest as applied to the Appellant. Further, the contemporaneous conviction of armed robbery and other felonies, does not deserve great weight.

The Appellant contends this sentence is properly reduced to life imprisonment based upon the holdings of this court in Rembert, Lloyd. Songer, Campbell, Livingston and Terry, cited in the Initial Brief, pp. 84-88.

CONCLUSION

WHEREFORE, the Appellant requests that this court will either remand this matter for a new re-sentencing proceeding or will reverse and remand with instructions to the lower court to impose a sentence of life in prison without parole for 25 years,

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 mail, to Ken Nunnally, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and, to Mr. Anthony J. Farina, #684135, P3227S, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083-0221, this 2d day of June, 1999.

Jeffrey L. Dees

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