IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Appellant,

v. Case No. 93,373

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Issues I, II, III, IV, V, and VIII. Appellant will rely on the arguments presented in the initial brief as to Issues VI and VII.

ARGUMENT

Point I

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT BRADLEY'S CONVICTION FOR EITHER PREMEDITATED OR FELONY MURDER BECAUSE THE EVIDENCE WAS EQUALLY CONSISTENT WITH AN INTENT TO BEAT UP THE VICTIM, NOT TO KILL HIM, AND BRADLEY COULD NOT HAVE COMMITTED THE BURGLARY UPON WHICH THE MURDER CHARGE WAS BASED BECAUSE HE WAS INVITED INTO THE HOME BY LINDA JONES.

Although the state argues on page 16-17 of its Answer Brief that appellant's failure to object to the premeditation instruction waives his sufficiency claim as to premeditated murder, the state nonetheless acknowledges appellant moved for

judgment of acquittal "because of insufficiency of the evidence" as to this charge. Furthermore, as the state also acknowledges, at page 18, this Court has an independent duty to review the sufficiency of the evidence in capital cases. Fla. R. App. P. 9.140(h)(in death penalty cases, court shall review evidence to determine if interests of justice require new trial even when insufficiency not raised); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981)(same). This Court recently reversed a conviction based on that independent duty in Miller v. State, 733 So. 2d 955 (Fla. 1998)(reversing Miller's conviction for burglary, finding the "committed during a burglary" aggravator invalid, and reversing the death sentence, although issue not raised on appeal). Accordingly, Bradley's claim that the evidence was insufficient to prove first-degree murder is preserved for review.

On pages 19-26 of its Answer Brief, the state discusses the circumstantial evidence standard of review. The state first contends the circumstantial evidence standard should not apply here because the evidence was not "wholly circumstantial." Next, the state concedes the evidence of appellant's intent is wholly circumstantial, as it is in most cases. Then, the state argues that because intent is rarely proved by direct evidence, a lesser standard of review should apply to prove crimes with a specific intent element, such as premeditated murder.

Appellant urges the Court not to reverse centuries-old law on this issue. The element of intent is what elevates a murder from one level of seriousness to another. Premeditation is the essential element that distinguishes first-degree murder from second-degree murder. Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997). To lower the standard of review on the intent element would denigrate the legislature's intent to impose greater punishment for premeditated murders than for other kinds of murder. Furthermore, this Court has in numerous recent cases reaffirmed the circumstantial evidence standard of review for premeditated murder. Green v. State, 715 So. 2d 940 (Fla. 1998); Norton v. State, 709 So. 2d 87 (Fla. 1997); Coolen; Kirkland v. State, 684 So. 2d 732 (Fla. 1996); Terry v. State, 668 So. 2d 954 (Fla. 1996). This argument should be rejected.

As for the evidence of premeditation, the state asserts appellant relies on a version of the facts on which the state produced conflicting evidence. Then, on pages 32-37, the state catalogues some of that evidence. None of the evidence the state points to conflicts with the defense theory that this was a planned beating gone awry, not a planned killing, however. The state's evidence shows a conspiracy, perhaps, but not a conspiracy to kill. The only evidence suggesting anyone considered killing Jack was Linda Jones's conversation with Janice Cole. Linda's comments to Cole show only that the thought

crossed her mind, not that she engaged Donald Bradley to kill Jack or that Donald Bradley agreed to do so. Nor does Bradley's after-the-fact statement to McWhite that he was to be paid from the insurance proceeds prove the killing was planned. Any agreement to pay Donald from the insurance proceeds could have occurred after Jack was dead. The state has not pointed to any evidence that conflicts with a plan to merely beat Jack up.

The state also argues the beating itself proves premeditation. In so arguing, the state emphasizes the numerous injuries and the continuing nature of the attack. The beating was of brief duration, however. Linda Jones and Donald Bradley were talking on the phone at 8:17 p.m., and the call to the dispatcher came in at 8:31. It would have taken the intruders several minutes to get inside the house, and evidence suggests Linda Jones cleaned up before she called the police. The intruders could not have been in the house for more five minutes or so. Moreover, according to the medical examiner's testimony, which was consistent with the McWhites' version of what occurred, most of the blows were nonlethal and Mr. Jones was conscious when they were struck. Only the blows to the head, the last ones administered, were lethal. Donald Bradley could have struck the last two blows intending only to render Mr. Jones unconscious, not to kill him.

As for felony murder, the state has argued consent was revoked by Jack. Consent was not revoked by Linda, however. The state also asserts Linda did not consent to the manner of the beating. Linda, however, directed the beating in the first place, and, moreover, was present when it took place and did nothing to stop it. Linda's feeble attempt to pretend she was a real victim--her only comment during the entire episode, the word "stop"--hardly proves she did not consent to the beating that was taking place before her very eyes.

On page 53, the state says Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993), controls because "[a]pparently, Fotopoulos was also occupying the home at the time." Although the opinion does not clarify the exact living arrangements of the parties involved, Fotopoulos is never identified as an occupant of the home. The opinion states Fotopoulos gave Chase, the hired killer, permission to enter his mother-in-law's home to kill his wife, Lisa. Fotopoulos is identified as the "son-in-law of the owner and occupant of the burglarized home," meaning the mother-in-law, not Fotopoulos, was the owner and occupant of the house.

K.P.M. v. State, 446 So. 2d 723 (Fla. 2d DCA 1984), also is distinguishable. There, the son of the owner of the house gave his friends permission to enter. Furthermore, unlike in the present case, the son was not present when his friends entered.

Point II

THE EVIDENCE WAS INSUFFICIENT TO PROVE CONSPIRACY TO COMMIT FIRST-DEGREE MURDER.

Citing numerous cases, none of which are on point, as is apparent even from the explanatory parentheticals in the state's brief, the state has asserted this claim is procedurally barred. This claim was properly preserved by appellant's motions for judgment of acquittal on all counts. XVIII 1554, XIV 1713.

At page 61 of its answer brief, the state has asserted evidence of a conspiracy to commit murder was introduced, referring to the evidence discussed in its answer to Point I. As discussed in Point I in appellant's Initial and Reply Briefs, however, none of that evidence conficts with the defense theory that the plan was only to hurt, not to kill.

Point III

THE EVIDENCE FAILED TO ESTABLISH A BURGLARY BECAUSE DONALD BRADLEY WAS INVITED TO ENTER THE JONES' RESIDENCE BY LINDA JONES.

The state has asserted this claim is procedurally barred. This claim likewise was preserved by appellant's motions for judgment of acquittal on all counts.

Point IV

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT DONALD BRADLEY VANDALIZED CARRIE DAVIS' CAR ON OCTOBER 31, 1995, WHERE SUCH EVIDENCE WAS NOT RELEVANT TO ANY MATERIAL ISSUE AND SERVED ONLY TO ATTACK BRADLEY'S CHARACTER BY SHOWING HIS PROPENSITY TO COMMIT CRIMES.

Although the state asserts the October 31 incident was not similar fact evidence, the state argues the October 31 incident is inextricably intertwined by Linda's motive, temporal relationship to the homicide, parties involved, and Linda's role in each. In other words, the state is saying the October 31 incident and the homicide are inextricably intertwined by their similarities. However, the Halloween incident plainly is not similar enough to be admissible as similar fact evidence, nor was it inextricably intertwined with the murder--necessary to describe the deed--which occurred two weeks later.

On pages 65-66, the state has asserted that "Janice Cole's testimony is dispositive." The state seems to be arguing that because Linda Jones mentioned to Janice her husband had bought jewelry for Carrie, Linda's attempt to retrieve the jewelry a week earlier is relevant and admissible. The state also asserts the November 7 homicide thus "flowed from" the October 31 incident. The homicide did not flow from the failed attempt to retrieve the rings. There is no evidence Linda decided to kill her husband because she could not get the rings back. Her animosity and hostility to her husband clearly went deeper than

that.[1] Furthermore, if this evidence were admissible to show Linda's motive, then all the other prior bad acts by Linda also would have been admissible. The trial judge, however, properly excluded those prior crimes.[2]

The state has cited several cases holding prior threats or assaults on the victim are admissible to prove premeditation. The Halloween incident was not a prior threat or assault on the victim, however. The victim, Jack Jones, was not even involved in the Halloween incident. Linda Jones apparently waited until Jack Jones left Carrie's apartment before she directed her "henchmen" to try to get the ring back. The attempt to get the ring back also was not a prior threat or a prior assault, and thus had no bearing on whether the later homicide was premeditated. Furthermore, the attempt to get the ring back did not demonstrate Linda's feelings towards Jack, only her feelings about the ring and her feelings towards Carrie.

The Halloween incident was far from an integral piece of the puzzle and was not relevant at all to show a planned killing. All it showed was that Donald Bradley had committed a crime. The Halloween incident was probative and prejudicial because it

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[1]Indeed, she had asked others to kill her husband long before she tried to get the rings back.

[2]The other crimes included making false reports of two burglaries and a sexual assault, solicitation of Greg Green to kill Jack Jones, solicitation of Dwight Danahoo to kill Jack Jones, and solicitation of Dwight Danahoo to beat up or kill Carrie Davis.

showed Bradley's propensity and bad character--its sole purpose was to suggest to the jury that because Bradley committed the earlier crime, he also committed the later one. Such evidence is inadmissible under sections 90.404(2)(a) and 90.403, and the trial court's admission of the testimony concerning the Halloween incident requires a new trial.

Point V

THE TRIAL COURT ERRED IN ADMITTING AN OUT-OF-COURT STATEMENT BY DETECTIVE REDMOND TO THE EFFECT THAT BRADLEY'S VAN HAD BEEN DETAILED FIVE TIMES SINCE THE MURDER TO REBUT AN IMPLIED CHARGE OF RECENT FABRICATION WHERE REDMOND NEVER TESTIFIED AT TRIAL.

The state asserts the prosecution was entitled to corroborate Waugh's testimony about the detailing. Appellant agrees. The state was entitled to corroborate Waugh, *but not with hearsay*. The state could have put Redmond on the stand but Steve Leary's testimony as to what Redmond said was inadmissible hearsay.

Point VIII

BRADLEY'S DEATH SENTENCE IS DISPROPORTIONATE.

The state has argued Donald Bradley "micromanaged" the brutality and thus is more culpable than Linda Jones and more deserving of death. State's Answer Brief at 86. The evidence shows, however, that Linda Jones micromanaged the entire episode, including its brutality. The evidence shows Donald Bradley did

nothing without her specific direction, that he was less a "henchman" of Linda JOnes than a puppet whose strings she pulled at will. The record of phone calls on October 31 and November 7 show that Linda Jones was the mastermind of every detail of this murder. Linda Jones made careful plans, and directed Donald Bradley to follow those plans. Linda Jones made sure the door was unlocked; Linda Jones told Donald how to get into the front door without triggering the security lights; Linda Jones told Donald Bradely to come through the garage so he could retrieve Jack's gun so Jack would be defenseless.

And Linda planned the brutality. It was Linda Jones who decided her husband should be beaten to death. Beating Jack to death was her idea. Not only did she plan the brutal beating, she made sure she was there to see it happen. Linda Jones sat and watched. Linda Jones was sitting right next to her husband, doing nothing, during most of the beating. Even when she was in a different room, she kept "peeking" around the corner to watch the beating. The state's reliance on the McWhites' testimony that Linda said, "stop," at one point during the beating is weak indeed, since the McWhites also testified she appeared to be acting. Linda's one small protestation was phoney and nothing more than part of Linda Jones' carefully orchestrated cover-up attempt.

This murder involved more than greed -- this was a murder of vengence, deliberately designed by Linda Jones to cause pain. The state's attempt to downplay her culpability and role is completely belied by the facts. Not only did she plan every detail of the crime, she personally oversaw its commission and carefully played out a cover-up scheme to the police and to her own family immediately after the murder and until Brian McWhite's arrest nearly a year later.

On page 86 of its Answer Brief, the state argues this case is different from Larzelere v. State, 676 So. 2d 394 (Fla.), cert. denied, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996), because Larzelere set up her husband's murder months in advance. Linda Jones also planned this murder in advance. Indeed, Linda Jones was soliciting Greg Green and Dwight Danahoo to kill her husband in August, several months before she finally got Bradley to do it. "Tried to get one to do it; he wouldn't do it. Let's try to another; he wouldn't do it. Finally got Donald Bradley."[3] She went to three different men to find someone to do her dirty work. She had a plan and was determined to carry it out. This case is different from Larzelere, but not in the way the state asserts. The difference is that Mrs. Larzelere had her husband shot whereas Linda Jones had her husband beaten to death with a bat.

[3]From the prosecutor's closing argument in the Linda Jones case. SR 617.

As the prosecutor argued in Linda Jones's trial, Linda Jones was "pulling the strings," SR 604, Linda Jones "orchestrated the events of November 7, 1995." SR 615.

> "It was her plan.
>
> Remember the testimony of Greg Green, she wanted him to suffer.
>
> A gunshot to the back of the head is a fairly quick death. Multiple blows to the head and the back and the knees might take just a little bit longer." SR 616.
>
> . . . .
>
> "Who is the architect of the circumstances? She's sitting right there." SR 624.

On pages 87-88, the state argues Jack Jones' infidelity gave Linda Jones some degree of a "pretense of moral justification." This Court has never held spousal infidelity is a pretense of moral justification and should not so hold.

This Court has defined this element of the CCP aggravator as

> any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification or defense.

Walls v. State, 641 So. 2d 388 (Fla. 1994)(emphasis added), cert. denied, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995). Thus, the Court has found a "pretense of moral or legal justification" only where the victim has overtly confronted and physically threatened the defendant at the time of the murder, see Blanco v. State, 452 So. 2d 520 (Fla. 1984)(victim confronted

and struggled with the defendant during burglary); Cannady v. State, 427 So. 2d 723 (Fla. 1983)(robbery victim jumped at defendant before fatal shot), or where there has been a prior death threat by the victim. Banda v. State, 536 So. 2d 221 (Fla. 1988)(defendant said "the guy threatened to kill me so I figured I better get him first"), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989); Christian v. State, 550 So. 2d 450 (Fla. 1989)(prison murder where victim knocked defendant unconscious and, for three weeks after attack, made death threats until defendant surprised and killed victim), cert. denied, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990).

Marital infidelity is not a pretense of moral justification and should not have been weighed in the balance by judge or jury. Although the trial judge did not himself find a pretense of moral justification, he stated the jury may have found some pretense of justification and apparently took this possibility into consideration in following the jury's recommendation of death for Donald Bradley. V 870-871. This was error on the trial judge's part. Speculation about why the jury in Linda Jones' case recommended life should not be a part of the trial judge's or this Court's proportionality analysis. Linda Jones's jury may have believed both Linda and Donald deserved life. Bradley's jury, on the other hand, may have believed they both deserved death. Proportionality is a judicial issue, not a jury issue,

however, and neither jury was asked to determine the relative culpability of Jones and Bradley. Although Bradley argued Linda Jones' life sentence as a mitigator, the jury was not given the task of determining Linda Jones's and Donald Bradley's relative culpability or the legal standard for doing so, nor was the jury told it must recommend life for Bradley if it found Linda equally or more culpable.[4]

Finally, on pages 93-95, the state discusses cases in which the murder was HAC and the Court upheld the death penalty. None of those cases, however, involve a codefendant who planned, instigated, and directed the details of a murder for hire, as here. These cases thus are inapposite to appellant's claim of disparate punishment under Slater v. State, 316 So. 2d 539 (Fla. 1975).

The critical question under Slater is: Are the differences in aggravating and mitigating factors between the two codefendants great enough to warrant death for one and life for the other? The answer in this case is a resounding no. The

[4]There are more obvious reasons for why Linda Jones's jury recommended life. First, the prosecutor's closing argument in the penalty phase of Linda's trial was a mere five pages, and the prosecutor did not even ask for the death penalty. In addition, Linda's daughters, Shane and Jill, both testified, saying they still considered their mother an important part of their live. Linda's brother, when asked by defense counsel, "Do her daughters need her?," responded, "Absolutely, especially since they don't have a father." It is more likely Linda Jones received a life recommendation because the state made no argument for death and because the jurors felt sympathy for her daughters.

differences are insignificant. Linda Jones went to three different people to find someone to beat her husband to death. She planned every detail of the crime. And when she found someone to do the beating, she was present and watching, not only to make sure it was accomplished, but so that she could see her husband suffer. Linda Jones showed no remorse and has taken no responsibility for murdering her husband. She is 100% equally culpable for this crime. Under Slater, Donald Bradley's death sentence should be reduced to life in prison with no possibility of parole.

CONCLUSION

Based on the argument, reasoning, and citation of authority in this and the initial brief, appellant asks that this Court grant the relief requested in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Stephen R. White, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, DONALD BRADLEY, #066600, Florida State Prison, Post Office Box 181, Starke, Florida 32091-0181, on this ___ day of January, 2000.

_____
Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Appellant,

v. Case No. 93,373

STATE OF FLORIDA,

Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

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