IN THE SUPREME COURT OF FLORIDA

JULIO MORA,

Appellant,

vs. Case No. 94,421

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

AMENDED SUPPLEMENTAL BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JULIO MORA, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s). Reference to Appellant's brief will be by the symbols "AB."

STATEMENT OF THE CASE AND FACTS

Appellee adopts its statement of the case and facts from its initial brief and offers the following additions, necessary to resolve the issue presented for supplemental briefing:

Facts relating to preservation

The actual pleading that raised the involuntary intoxication issue was actually presented in Appellant's pro se "Motions to Supplement Mr. Reibman's Brief, Renewed Motion to Compel, and Motion to Stay Until the Trial Court Provides New Case's Records" on pages 27 through 30. But in an order dated Tuesday, June 13, 2000 this Court struck this pleading as unauthorized and returned said motion with the order. (Appx A). This Court also refused to allow any additional pro se filings. (Appx A).

At the charge conference, the following exchange occurred:

> COURT: Following the instruction on insanity. I know we have the request for an intoxication defense as well?
>
> DEFENSE COUNSEL: Yes, Your Honor.
>
> COURT: That would follow that. That would be voluntary intoxication, 3.04(g).
>
> APPELLANT: Involuntary, Your Honor.
>
> COURT: There is no such thing. It's voluntary.
>
> APPELLANT: The intoxication with a deadly -- with a knife, and the gases, isn't that voluntary intoxication?
>
> COURT: First of all, there is no allegation with regard to the gases the night before this offense, nor that they were hallucinogenic --
>
> APPELLANT: No, no.

> COURT: Excuse me. Would you please just be patient. The intoxication is based upon all of the pills that you claim that you took that morning.
>
> APPELLANT: Yeah, it's medication.
>
> COURT: Pills, right.
>
> APPELLANT: It's not involuntary.
>
> COURT: No, no, no, you took them. That's voluntary.
>
> APPELLANT: But it's also the night before, I was given this deadly gases. It was here.
>
> COURT: It's 3.04(g), voluntary intoxication. It would be by the use of drugs.
>
> APPELLANT: There is no involuntary intoxication.
>
> COURT: That is basically correct.
>
> APPELLANT: I think it is.
>
> COURT: I'm glad you do. * * *

(T 2547-2549). A review of the record reveals that neither Appellant, nor his counsel submitted a proposed instruction in writing.

Facts relating to necessity and propriety of instruction

At one point in his testimony, Appellant indicated at one point in his testimony that he took a taxi on that fateful morning because "[he] was totally drugged, no? Between the Freon 12 and the drugs I took, I was just like a zombie that morning." (T 2122). Appellant knew that gases were being pumped into his house. (T 1859, 1863-1864, 1877-1878). And he bought fans, a special pump, kept the windows open, got a gas mask and bought special filters to

remove the gas and to "have some peace." (T 1878-1879, 1880-1881). As a result, Appellant explained, "[s]o I have a, so-so fresh air from outside to clean my apartment. That's the way I was able to survive." (T 1881).

Facts relating to harmless error

Defense counsel explained to the jury that the important thing to consider was that Appellant really believed these things were happening to him, **not** that they actually were happening to him. (T 2625, 2635, 2641-2645, 2647, 2650). Counsel also explained that "[a]s Dr. Stock says, everything that goes into [Appellant's] mind goes through a filter. And within that filter, no matter what the relevant facts of the case are, or no matter what reality is in the situation, to him somebody is out to get him. To him, somebody is out to plot against him, whether it's the state or anybody else out there." (T 2625). Counsel also argued that Appellant did not just make these conspiracy claims up. Rather, he had been complaining for years that people had been trying to gas him. (T 2636).

The court did instruct the jury on voluntary intoxication (T 2790), as well as on the issue of insanity (T 2789) and mental infirmity (T 2789-2790).

SUMMARY OF THE ARGUMENT

The issue of Appellant's purported request for an involuntary intoxication instruction is not properly before this Court as the pro se pleading, which addressed this claim was stricken per this Court's order and it was not raised in either Appellant's initial or reply brief. Moreover, because there was no standard instruction on the involuntary intoxication instruction, it was incumbent upon Appellant to provide the court with a written instruction in order to preserve this issue for appellate review.

If preserved, however, no instruction was necessary because there was insufficient evidence to support giving this instruction. But if it should have been given, any error was harmless in light of the overwhelming amount of evidence of Appellant's guilt and the fact that defense counsel told the jury in his closing argument that he was not asking them to believe that Appellant was actually gassed.

ARGUMENT

THE TRIAL COURT'S FAILURE TO GIVE AN INSTRUCTION ON INVOLUNTARY INTOXICATION DID NOT PREJUDICE APPELLANT.

This Court has directed the state to brief the issue of involuntary intoxication based on Appellant's purported request for an involuntary intoxication jury instruction. In an effort to respond to this directive the state submits the following responses:

1. Preservation

Initially, the state contends that any attempt to address this issue on direct appeal should be precluded and is better suited for a collateral proceeding challenging the effectiveness of appellate counsel. The actual pleading that raised the involuntary intoxication issue was actually presented in Appellant's pro se "Motions to Supplement Mr. Reibman's Brief, Renewed Motion to Compel, and Motion to Stay Until the Trial Court Provides New Case's Records" on pages 27 through 30. But in an order dated Tuesday, June 13, 2000 this Court struck this pleading as unauthorized and returned said motion with the order. (Appx A). This Court also refused to allow any additional pro se filings. (Appx A). Such action is consistent with this Court's previous ruling in Hill v. State, 656 So.2d 1271 (Fla. 1995). "The principle of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), concerning self-representation is not applicable to appeals." Hill, 656 So.2d at 1272; see also Martinez

v. California, 13 Fed.L.Weekly S17, 19 (January 12, 2000)(holding that states not required to recognize constitutional right to self-representation on direct appeal from criminal conviction).

What is more, although Appellant was allowed to file a pro se brief, he has never been appointed to act as his own counsel for the instant appeal. Thus, the state submits that this issue has not been properly raised and is not a part of the record according to this Court's order. As a result, any consideration of this issue must be saved for another day. A habeas corpus petition is the proper vehicle for bringing claims of ineffective assistance by appellate counsel. See Medina v. Dugger, 586 So.2d 317, 318 (Fla.1991). Thus, the state submits that this issue has been waived for review on direct appeal.

The state next notes that Appellant has failed to preserve this issue for review. Although Appellant may have requested that the court instruct on involuntary intoxication in addition to voluntary intoxication, it was incumbent upon Appellant to provide the court with a proposed instruction because there was no standard instruction on this issue. "When a jury instruction is requested that is not part of the Florida Standard Jury Instructions, the requested instruction must be submitted in writing to the trial court if the issue is to be preserved for appellate review." Watkins v. State, 519 So.2d 760, 761 (Fla. 1st DCA 1988); see also Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983). In Watkins, the reviewing court found that because the proposed instruction was not in writing, the defendant had failed to preserve the issue.

"While there is currently a standard jury instruction on voluntary intoxication (Instruction 3.04(g)), this was restored to the criminal jury instructions in May 1987, after appellant's trial. Appellant's trial fell during the hiatus period when there was no standard jury instruction on voluntary intoxication. Thus, appellant's special requested instruction should have been in writing."

The state contends that the same holds true here. At the charge conference, the following exchange occurred:

> COURT: Following the instruction on insanity. I know we have the request for an intoxication defense as well?
>
> DEFENSE COUNSEL: Yes, Your Honor.
>
> COURT: That would follow that. That would be voluntary intoxication, 3.04(g).
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> APPELLANT: Involuntary, Your Honor.
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> COURT: There is no such thing. It's voluntary.
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> APPELLANT: The intoxication with a deadly -- with a knife, and the gases, isn't that voluntary intoxication?
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> COURT: First of all, there is no allegation with regard to the gases the night before this offense, nor that they were hallucinogenic --
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> APPELLANT: No, no.
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> COURT: Excuse me. Would you please just be patient. The intoxication is based upon all of the pills that you claim that you took that morning.
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> APPELLANT: It's not involuntary.
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> APPELLANT: There is no involuntary intoxication.
>
> COURT: That is basically correct.
>
> APPELLANT: I think it is.
>
> COURT: I'm glad you do. * * *

(T 2547-2549). A review of the record reveals that neither Appellant, nor his counsel submitted a proposed instruction in writing. And it is also clear, as the trial court explained, that there was no standard instruction on involuntary intoxication. See also Brancaccio v. State, 698 So.2d 597, 601 (Fla. 4th DCA 1997). Thus, Appellant's modest request for this instruction was insufficient to preserve the issue.

What is more, the complex nature of the proceedings and the vast potential for confusion of the jury only serves to underline the necessity for a written proposal. Even after the court declined Appellant's invitation, assuming for the sake of argument that Appellant did not know there was no standard instruction, after the trial court informed of this fact, it was incumbent upon Appellant/counsel to come forward with a proposed instruction for the trial court to review. Therefore, absent fundamental error,

this issue is not reviewable. As will be more thoroughly addressed below, the state submits that no fundamental error occurred. Therefore, Appellant is not entitled to a new trial.

2. Necessity and propriety of instruction

Alternatively, in reaching the merits of this issue, the state contends that there was no error in the failure to give this instruction because Appellant did not present any evidence to support giving it. In Brancaccio v. State, 698 So.2d 597 (Fla. 4th DCA 1997)[1], the Fourth District required that the defendant receive a new trial because the trial court refused to instruct on involuntary intoxication, despite the defense request and submissions of several forms of jury instructions on this issue. Id. at 600. The reviewing court also noted that there was evidence to support this instruction. In the defendant's statement he told the officer that he was taking Zoloft and he told one of the medical experts that he thought he took it on the day of the killing. In addition, there was ample evidence (expert testimony and mental hospital records, *inter alia*), which showed that Zoloft had an adverse reaction on the defendant. Id. at 600. Here, unlike Brancaccio, there was no expert testimony showing that the gases had an adverse reaction on Appellant.

Additionally, in a footnote the Fourth District observed that "Florida does not have a standard jury instruction on involuntary intoxication." Id. at 601. But it went on to suggest that Florida

[1] Appellant was tried in April of 1997. The Brancaccio decision was released in September of 1997.

follow the involuntary intoxication instruction as paraphrased from Missouri's Standard Criminal Instruction 310.52:

> An intoxicated condition is involuntarily produced when it is brought about by the introduction into his body of any substance which he does not know and has no reason to know has a tendency to cause an intoxicated or drugged condition.
>
> The second sentence of Florida's insanity instruction 3.04(b) would also have to be amended to read: "A person is considered to be insane when: 1) He had a mental infirmity, disease, defect or was involuntarily intoxicated."

Brancaccio v. State, 698 So.2d at 601. Taking a cue from this instruction, the state submits that even if a proposed instruction such as that above would have been submitted to the trial court for its review, there was insufficient evidence in the record mandating that an involuntary intoxication instruction be given. In other words, Appellant presented no evidence linking his conduct in that deposition room to a reaction to the mysterious gases. Moreover, Appellant must be required to provide some evidence as to the amount of gas inhaled during the hours preceding the murders. He cannot simply say there were gases. For example, with voluntary intoxication, courts have held that "evidence of alcohol consumption prior to the commission of the crime does not, by itself, mandate the giving of a jury instruction with regard to voluntary intoxication." Linehan v. State, 476 So.2d 1262, 1264 (Fla.1985). In Linehan, there was evidence that the defendant had been drinking before the robbery, but there was no evidence regarding the amount of alcohol he consumed during the several

hours preceding the robbery. Id. at 1264. "In short, the instruction is not required if evidence shows use of intoxicants but does not show intoxication to the extent that the defendant was unable to form the intent necessary to commit the crime charged." Randolph v. State, 526 So.2d 931, 933 (Fla. 1st DCA 1988), review denied, 536 So.2d 245 (Fla.1988). This is precisely what is lacking in the instant case.

Although admittedly Appellant indicated at one point in his testimony that he took a taxi on that fateful morning because "[he] was totally drugged, no? Between the Freon 12 and the drugs I took, I was just like a zombie that morning." (T 2122). This testimony fails to establish that the gases, which Appellant purportedly breathed in, affected his ability to form the requisite criminal intent *at the time of the offense*. See id. Nor is there anything in the record indicating that Freon 12, when inhaled, causes hallucinations or involuntary behavior. While it may very well be the case, the record must so demonstrate to prevent jurors from speculating as to the actual effects of a substance, be it gas or a mixture of drugs.

Also significantly, in order to warrant an involuntary intoxication instruction, Appellant must not have known that he was being drugged/gassed. See Brancaccio, 698 So.2d at 601. But his own testimony and argument reveals that he knew the gases were present. So much so, that he took affirmative steps to negate them (gas mask, air filters, air pump, fans) and to counteract any effects the gases would have had on him (pills). (T 1859, 1863-

1864, 1877-1878, 1879, 1880-1881). "So I have a, so-so fresh air from outside to clean my apartment. That's the way I was able to survive." (T 1881). Moreover, knowing that he was being gassed, Appellant chose to stay in his apartment rather than to find another place to stay. Under the above instruction, however, an intoxicated condition is involuntarily produced when it is brought about by the introduction into a defendant's body any substance that he does not know and has no reason to know causes intoxication. But again, Appellant claims that he knew he was being gassed and that he knew the effects of the gas. Since Appellant admitted that he knew about the gas and that he undertook extensive countermeasures, he was not entitled to this instruction.

3. Harmless Error

If this Court finds, however, that the trial court should have instructed the jury on involuntary intoxication, any error was at worst, harmless. "Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error." Sochor v. State, 619 So.2d 285, 290 (Fla. 1993). Although involuntary intoxication may be a defense to premeditated murder, it is not an essential element of premeditated murder. See id.

In Powers v. State, 369 So.2d 640, 642 (Fla. 3d DCA 1979), the reviewing court applied a harmless error analysis, in affirming the appellant's conviction for burglary, armed robbery and kidnaping. Although the trial court refused to give the requested voluntary or involuntary intoxication instruction, it did instruct the jury that the appellant could not be convicted of any offense requiring

criminal intent, unless the prosecution had established beyond a reasonable doubt that the appellant had "sufficient use of her normal faculties to form such intent." Id. at 642. Thereafter, the jury entered a verdict of guilty on the eleven counts charged. The court observed that "[i]mplicit within that rendition was the jury's determination that the appellant was mentally capable of forming the requisite criminal intent. From this evidence, the jury could, as it did, rationally infer that the appellant possessed the requisite criminal intent necessary for her convictions. Because of this determination, the manner, i. e., by voluntary or involuntary intoxication, of appellant's asserted insanity was not a necessary consideration for the jury. Thus, even assuming for the sake of argument that it was error for the trial court to fail to allow appellant to introduce evidence in regard to her insanity by reason of involuntary intoxication or to give the jury instructions requested by her in that regard, because of the jury's findings that appellant did have the requisite criminal intent to commit the offenses with which she was charged, it was at most harmless error." Id.; see also Ballard v. State, 31 Fla. 266, 12 So. 865 (1893); Vasquez v. State, 54 Fla. 127, 44 So. 739 (1907); Moore v. State, 83 Fla. 270, 91 So. 180 (1922); and Breen v. State, 84 Fla. 518, 94 So. 383 (1922).

Similarly, in this case, the jury heard Appellant's testimony that he had been gassed and that he had taken numerous pills. And here, unlike Powers, the court did instruct the jury on voluntary intoxication (T 2790), as well as on the issue of insanity (T 2789)

and mental infirmity (T 2789-2790). Even with these instructions, however, the jury found Appellant guilty as charged. Implicit in this determination, then, is that Appellant did have the requisite criminal intent to commit the offenses for which he was charged.

In addition, there was an extraordinary amount of evidence demonstrating Appellant's ability to act intentionally and to think and speak coherently. This evidence came in the form of not only eye witness testimony, but also from the audio cassette, which captured Appellant's words and actions forever on tape. And it is entirely unreasonable, in the face of so much evidence to the contrary, that the jury believed that the gases affected Appellant's ability to act intentionally.

Finally, the state notes that defense counsel explained to the jury that the important thing to consider was that Appellant really believed these things were happening to him, **not** that they actually were happening to him. (T 2625, 2635, 2641-2645, 2647, 2650). Stated another way, counsel told the jury that Appellant was not really gassed. He just **thought** he was being gassed because of his mental disease. "As Dr. Stock says, everything that goes into [Appellant's] mind goes through a filter. And within that filter, no matter what the relevant facts of the case are, or no matter what reality is in the situation, to him somebody is out to get him. To him, somebody is out to plot against him, whether it's the state or anybody else out there." (T 2625). Counsel also argued that Appellant did not just make these conspiracy claims up.

Rather, he had been complaining for years that people had been trying to gas him. (T 2636). In sum, defense counsel's closing argument is important because it told the jury that **the gases were not real**. Therefore, the failure to give an involuntary intoxication instruction because of these illusory gases is of no constitutional moment. Thus, because substantial, competent evidence supported the jury's verdict, this Court must conclude that the refusal of the trial judge to give an involuntary intoxication instruction constituted harmless error beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to GENE REIBMAN, at 600 Northeast Third Avenue, Ft. Lauderdale, FL 33304 on this 5th day of June, 2001.

_____
MARRETT W. HANNA
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
MARRETT W. HANNA

IN THE SUPREME COURT OF FLORIDA

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_____/

APPENDIX