IN THE SUPREME COURT OF FLORIDA

WILLIE SETH CRAIN, JR.,	:	
Appellant,	:	
vs.	:	Case No.SC00-661
STATE OF FLORIDA,	:	
Appellee.	:	
______________________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

ARGUMENT 2

ISSUE I

THE STATE DID NOT PROVE THAT THE KILLING OF AMANDA BROWN WAS PRE-MEDITATED. 2

ISSUE II

THE STATE DID NOT PROVE AN ESSENTIAL ELEMENT OF KIDNAPPING AND FELONY MURDER, THAT AMANDA BROWN WAS ABDUCTED WITH THE INTENT TO COMMIT OR TO FACILITATE A HOMICIDE. 12

CERTIFICATE OF SERVICE 15

TABLE OF CITATIONS

CASES	PAGE NO.
Brewer v. State, 413 So. 2d 1217 (Fla. 5th DCA 1982), review denied, 426 So. 2d 25 (Fla. 1983)	13
Coolen v. State, 696 So. 2d 738 (Fla. 1997)	12
Hoefert v. State, 617 So. 2d 1046 (Fla. 1993)	9, 10
Mills v. State, 407 So. 2d 218 (Fla. 3d DCA 1981)	13
Norton v. State, 709 So. 2d 87 (Fla. 1997)	9, 10, 13
Randall v. State, 760 So. 2d 892 (Fla. 2000)	5
Sean v. State, 775 So. 2d 343 (Fla. 2d DCA 2000)	12
State v. Atwood, 832 P. 2d 593 (Ariz. 1992), cert. denied, 506 U.S. 1084 (1993), overruled on other grounds, State v. Nordstrom, 25 P. 3d 717 (Ariz. 2001)	13, 14
State v. Law, 559 So. 2d 187 (Fla. 1989)	13
State v. Nordstrom, 25 P. 3d 717 (Ariz. 2001)	14
State v. Scott, 555 P. 2d 1117 (Ariz. 1976)	14

PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Willie Seth Crain, Jr., in reply to the Answer Brief of the Appellee, the State of Florida. Appellant relies upon the arguments and authorities presented in his Initial Brief for Issues III and IV, and those presented in his Supplemental Brief for Issue V.

ARGUMENT

ISSUE I

THE STATE DID NOT PROVE THAT THE KILLING OF AMANDA BROWN WAS PRE-MEDITATED.

Appellee claims that premeditation was established by "the State's combination of blood evidence, luminol testing, and, appellant's conduct and statements before and after Amanda's murder." Answer Brief, at 43. However, a careful examination of those portions of the state's evidence reveals that they did not prove premeditation.

Appellee claims that a "blood bath" occurred in Crain's bathroom based on the facts that Amanda was not bleeding when she visited Crain's trailer with her mother, a few small blood stains were found on the toilet and tissue paper found within the toilet, and that when the bathroom was sprayed with Luminol the whole area, including the floor, bathtub, and walls lit up. Answer Brief, at 43, 45-48. However, the few small blood stains on the toilet and tissue [V13, 1932-35; V16, 2383-92] certainly did not constitute a "blood bath." Moreover, the state's own evidence established a more reasonable explanation for the bathroom to light up when sprayed with Luminol than a "blood bath": Luminol glows in the dark when it reacts with blood or bleach. [V14 2133-34; V16 2364-66] When searching Crain's

trailer, Detective Brackett observed a very strong odor of bleach and a bleach bottle in the bathroom. [V13, 1931-32] When Brackett interviewed Crain, Crain said he spilled bleach in his bathroom and cleaned it up. [V13, 1912, 1924] Later in the interview, Crain said that after he left Hartman and Amanda, he went home and cleaned his bathroom with bleach. [V13, 1925] Despite Crain's self-contradiction about how the bleach got there, both his statements are consistent with the presence of bleach in his bathroom as observed by Detective Brackett. Thus, the bleach was the most likely cause of the extensive Luminol glowing in the bathroom.

Appellee's assertion that "the identifiable blood from Amanda found in the bathroom was part of a much larger blood spill," Answer Brief, at 47, is nothing but speculation. Similarly, appellee's assertion, "The only reasonable explanation for appellant's late night cleaning is that a large amount of blood was spilled in the bathroom and that appellant attempted to clean it up," Answer Brief, at 48, is also sheer speculation. The simple truth is that the state did not prove that there was ever a large amount of blood in Crain's bathroom.

More importantly, the presence of any amount of blood in the bathroom would not in any way prove that the killing was premeditated. Amanda could have bled in the bathroom while being killed during a second-degree depraved mind murder, during a manslaughter,

during a third-degree felony murder, or even during an accidental killing. The mere fact that Amanda bled in Crain's bathroom, even when two bloodstains contained a mixture of DNA consistent with both Amanda's DNA profile and Crain's DNA profile, [V16, 2409] does not prove anything about Crain's state of mind or intent and is not relevant to premeditation.

Appellee argues that Crain had scratches on his arms which were consistent with injuries that would be inflicted by fingernails from the hands of seven year old Amanda and that those scratches were inflicted at or near the time of Amanda's disappearance. Answer Brief, at 47. Dr. Russell Vega, an associate medical examiner, viewed photos of superficial scratch wounds on Crain's back and arms, but he did not examine Crain to see the actual scratches. [V14 1995-99, 2002] Dr. Vega testified that he was not able to come to any conclusion to a reasonable degree of medical certainty as to the origin of the scratches. He could not come to any conclusion or opinion as to whether the scratches were caused by human fingernails. [V14, 2014-15, 2023] While Dr. Vega testified that most of the scratches were consistent with a seven year old girl's fingernails, he also testified that most of the scratches were consistent with crab traps, wire mesh, twigs, branches, or other inanimate objects, and he could not say with any certainty what caused the scratches.

[V14 2001-23] Thus, the state did not prove that the scratches were made by Amanda's fingernails.

Even assuming that Amanda caused the scratches with her fingernails, that does not prove anything about Crain's state of mind or intent. In fact, the scratches could have occurred when Amanda resisted Crain while he was merely trying to hold her in his arms, with no intent whatsoever to kill Amanda. If anything, the infliction of the scratches could have enraged Crain, causing him to overreact and to inflict fatal wounds upon Amanda without intending to kill her. See Randall v. State, 760 So. 2d 892, 902 (Fla. 2000) (state's evidence consistent with hypothesis of innocence that defendant forcefully choked victims during consensual sex, became enraged when victims struggled, and continued to choke them until they died; this Court found insufficient evidence of premeditation).[1]

Appellee also argues, "There is no reasonable innocent explanation for how Amanda's blood came to be deposited on appellant's boxer shorts." Answer Brief, at 50. However, the state's DNA evidence establishing that the blood stain on Crain's boxer shorts matched Amanda's DNA profile, [V15, 2348; V16, 2408, 2441; V17, 2577] is relevant only to the issue of the identity of the perpetrator. It

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[1] In citing Randall, counsel is not suggesting that Crain had consensual sex with Amanda.

does not in any way tend to prove or disprove whether the killing of Amanda was premeditated.

Appellee argues that Crain "plied Amanda's mother with money to gain her trust and thereby gain access to Amanda." Answer Brief, at 43. This is a distortion of the state's evidence. Mrs. Hartman testified that she asked Crain if she could borrow $20 or $30 until she got her check on Friday. Crain handed her $50 and asked her if that was enough. He then handed her another $50. She told him she could not repay that much, and he responded that she did not have to pay him back. [V11, 1621] The fact that Crain was generous in response to Hartman's request to borrow money is not relevant to the issue of premeditation. Crain could not have known that Hartman would ask to borrow money, so he could not have planned to ply her with money to gain her trust.

Appellee argues that Crain "expressed an unusual degree of interest in Amanda, drawing with her, helping her with homework, giving her money, showing her favorite movie [Titanic], getting her alone in his room and having her sit between his legs, brushing and blow drying her hair." Answer Brief, at 44. Regarding Amanda sitting between Crain's legs, Hartman testified that Crain was showing Amanda the remote control for the television, [V11, 1586; V12, 1669] the incident did not cause her any concern, [V11, 1586] and Crain was not grabbing Amanda or touching her in any inappro-

priate manner. [V13, 1670] That Crain displayed an interest in Amanda is consistent with the behavior of someone who genuinely likes children or someone who wanted to enhance his opportunity to develop a relationship with Hartman. To the extent that this evidence was also consistent with the behavior of someone who wanted to harm Amanda, it is more consistent with a desire for sexual contact than with premeditated murder.

Appellee argues that Crain "provided Amanda's mother five valium, making his planned departure and murder of Amanda less likely to be interfered with or detected." Answer Brief, at 44. This is another distortion of the state's evidence. Hartman testified that she had been addicted to prescription pain pills for a number of years and had been getting them illegally. [V11, 1620; V12 1679-80] Hartman said she had taken some pain medication during the afternoon of September 10. [V12, 1684-85] There is no evidence that Crain knew about her addiction, nor that he knew she had already taken pain pills earlier in the afternoon. Instead, Hartman testified that she asked Crain if he had anything for pain, and he replied that he had two prescriptions, one for Elavil and another for Valium. Crain told Hartman that the Elavil would really knock the pain out and make her sleep for a long time, but Hartman chose the Valium. Crain gave her five Valium pills and took some Valium himself. [V11, 1618-20; V12 1678] Crain did not try to force her to take the Valiums; it was her

idea. [V12 1678-79] Crain also offered Hartman some marijuana, but she did not smoke it. [V11, 1620] Since there is no evidence Crain knew Hartman was addicted to pain pills, and he gave her the Valiums only after she asked for pain pills, the evidence provides no support for appellee's theory that Crain gave Hartman the pills as a part of a plan to murder Amanda. If Crain was trying to sedate Hartman to make it easier to kidnap Amanda, why did he tell Hartman the Elavil would make her sleep for a long time?

Appellee argues that Crain "and no one else had the opportunity to take Amanda." Answer Brief, at 44. Again, this is a matter relevant only to the identity of the perpetrator, which in no way proves that the killing of Amanda was premeditated. Appellee also argues that Crain "had ample time to think about taking Amanda, murdering her, and disposing of her body." Answer Brief, at 44. That Crain had time to premeditate does not in any way prove that he did premeditate the kidnapping and killing of Amanda.

Appellee argues that Hartman heard no unusual noises and did not wake up until after 6:00 a.m., Amanda was never seen again despite extensive searches for her body, she was afraid of the dark and never left her house alone at night, she never ran away, she had a good relationship with her mother, and she was looking forward to spending the next weekend with her father. Answer Brief, at 45.

None of those facts have anything whatsoever to do with the issue of premeditation.

Appellee argues that Crain "had previously bragged to an acquaintance that he knew how to dispose of a body where nobody would ever find it." Answer Brief, at 50. Albert Darlington, a commercial crabber, testified that Crain made two statements in the 18 months prior to September 11, 1998: "I can get rid of a body where nobody will ever find it," and, "I can get rid of a body and I know how to do it where nobody can find it." [V12, 1792-94] These statements were made when Crain said he was having disagreements with other crabbers about messing with his crabs or crab traps. [V12, 1801] Thus, the statements were made in a context that had nothing to do with Hartman or Amanda. Moreover, Hartman never met Crain until the evening of September 9, 1998, and there is no evidence Crain ever met Amanda until the afternoon of September 10 when he went to Hartman's trailer. [V11, 1545-48, 1565-67] Thus, Crain's statements to Darlington were not relevant to premeditation. Crain could not have been planning to murder Amanda during the 18 months before he met her and her mother.

Appellee argues that Crain's statement to Stemm[2] after Amanda's disappearance that Stemm had enough evidence to bury him if Stemm revealed where his crab traps were tends to show Crain's consciousness of guilt. Answer Brief, at 50. Evidence of consciousness of guilt may help to prove the identity of the perpetrator. It does not, however, provide any proof at all of premeditated intent to kill. Assuming Crain was the person responsible for Amanda's death, he ought to have felt consciousness of guilt regardless of whether the killing was premeditated, reckless, negligent, or accidental. The most that can reasonably be inferred from the statement is that Crain may have disposed of the body in the same location as the crab traps, but evidence that a defendant tried to conceal a crime does not prove that the crime was premeditated. See Norton v. State, 709 So. 2d 87, 93 (Fla. 1997) (fact that appellant may have taken steps to conceal evidence of a crime does not establish that he committed murder with a preconceived plan or design); Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993) (finding insufficient evidence of premeditation despite efforts by defendant to conceal evidence of crime).

Next, appellee points to Crain's statement, "Yes, I did do it." Answer Brief, at 50. Maryann Lee and Linda Miller went to Cynthia

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[2] Frank Stemm was the father of Melissa Crain, who was married to appellant's son, Willie Seth Crain III; he was not appellant's father-in-law as asserted by appellee in his Answer Brief, at 50. [V15, 2325-26]

Gay's trailer on the Saturday night following Amanda's disappearance, there was some discussion about the disappearance, and Crain was upset about being accused. [V14, 2138-46, 2158, 2164-68] According to Lee, Miller said, "Just remember, you didn't do anything, you didn't hurt that little girl," and Crain replied, "Yes, I did do it; yes, you're right; I didn't hurt her, I didn't do anything." [V14, 2152-53, 2158-60] According to Miller, she said, "Well, don't worry about anything, you didn't do anything to that little girl," and Crain responded, "Yes, you're right; I did do it," then said, "No, I didn't do it." [V14, 2168-71] Gay testified that Crain did not say he had anything to do with the disappearance of Amanda. He stuttered and said, "I did -- did -- didn't do it." [V18, 2671-72] Regardless of which version of the statement was believed, none of the versions had anything whatsoever to do with a premeditated intent to kill.

Appellee claims that "Appellant's conduct immediately after Amanda's disappearance was even more compelling than his statements." Appellee then points to Crain's "peculiar" early morning cleaning, the unusual manner in which he launched his boat to go crabbing before daylight, his wearing of inappropriate clothing, and his apparent discarding of those clothes while out on the boat. Answer Brief, at 51-53. Yet none of this evidence has anything whatsoever to do with proving a premeditated intent to kill. Again, a defendant's efforts to conceal a crime do not prove premeditation. See

Norton, at 93; Hoefert, at 1049. At most, the evidence helps to establish the identity of the perpetrator while proving nothing about the intent with which Amanda was killed.

In summary, none of the evidence presented by the state at Crain's trial proved anything about his intent when Amanda died. The state cannot prove premeditation by presenting a large number of facts which are not probative of intent and then claiming that such facts taken together establish intent. Zero plus zero plus zero plus zero does not equal one, no matter how many zeros are added. Because the state presented absolutely no evidence to establish premeditation, Crain's first-degree murder conviction cannot be sustained on an unproven theory of premeditation.

As argued in Issue II of appellant's Initial Brief, the state's failure to prove that Crain intended to kill Amanda also requires reversal of his conviction of the charged offense of kidnapping with intent to commit or facilitate a homicide. The state's failure to prove the charged kidnapping also forecloses a conviction for first-degree felony murder. Therefore, both the first-degree murder and kidnapping convictions must be reversed.

ISSUE II

THE STATE DID NOT PROVE AN ESSENTIAL ELEMENT OF KIDNAPPING AND FELONY MURDER, THAT AMANDA BROWN WAS ABDUCTED WITH THE INTENT TO COMMIT OR TO FACILITATE A HOMICIDE.

In support of the claim that the state proved Crain's intent to commit or to facilitate a homicide, appellee relies upon the same evidence he relied upon to show that the state had proved premeditation. Answer Brief, at 60-63. As argued in Issue I, supra, that evidence did not prove that Crain had an intent to kill. The intent to commit or to facilitate a homicide cannot be proved without proving an intent to kill. No person can intend to commit or facilitate a homicide without intending that someone will be killed.

Appellee's reliance upon Sean v. State, 775 So. 2d 343, 344 (Fla. 2d DCA 2000), for the proposition that "the question of intent is left to the collective wisdom of the jury," Answer Brief, at 61-62, is misplaced because that statement by the Second District is wrong as a matter of law. When proof of an intent is required to support a conviction, this Court has not hesitated to reverse the conviction when the state's evidence was insufficient to establish that intent. For example, this Court reversed a first-degree premeditated murder conviction and death sentence in Coolen v. State, 696 So. 2d 738 (Fla. 1997), upon finding insufficient evidence of premeditation, ruling, "Where the State's proof fails to exclude a reason-

able hypothesis that the homicide occurred other than by a premeditated design, a verdict of first-degree murder cannot be sustained." Id., at 741. Similarly, this Court vacated a first-degree premeditated murder conviction and death sentence upon finding a complete absence of evidence to support a finding of premeditation in Norton v. State, 709 So. 2d 87, 92 (Fla. 1997).

If a premeditated murder conviction cannot be sustained in the absence of proof of intent, a kidnapping conviction cannot be sustained in the absence of proof of the requisite intent. In Mills v. State, 407 So. 2d 218, 220-21 (Fla. 3d DCA 1981), the Third District ruled that the state is required to prove the specific intent alleged in charging the defendant with kidnapping, and could not satisfy its burden of proof by proving one of the other alternative intents provided by statute.

Appellee's reliance upon Brewer v. State, 413 So. 2d 1217, 1219 (Fla. 5th DCA 1982), review denied, 426 So. 2d 25 (Fla. 1983), for the proposition that "a trial court should rarely, if ever, grant a motion for a judgment of acquittal based on the state's failure to prove mental intent," Answer Brief, at 68, is also misplaced because the statement by the Fifth District is wrong as a matter of law. In State v. Law, 559 So. 2d 187, 188 (Fla. 1989), this Court ruled, "A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which

the jury can exclude every reasonable hypothesis except that of guilt."

Appellee's reliance upon State v. Atwood, 832 P. 2d 593 (Ariz. 1992), cert. denied, 506 U.S. 1084 (1993), overruled on other grounds, State v. Nordstrom, 25 P. 3d 717 (Ariz. 2001), Answer Brief, at 63-66, is also misplaced. First, Atwood was charged with felony murder and kidnapping with "intent to inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." Atwood, at 611. Therefore, the prosecution in Atwood was not required to prove that he had an intent to kill. Second, the Arizona court reviewed the kidnapping evidence in Atwood under the following standard: "[r]eversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." Atwood, at 614 (quoting State v. Scott, 555 P. 2d 1117, 1118-19 (Ariz. 1976).

Even if this Court were to adopt and apply the Atwood standard of review, this Court should reverse Crain's convictions for kidnapping and first-degree felony murder. As argued above and in Issue I, supra, there is a complete absence of any probative evidence to establish that Crain had an intent to kill, so there was also a complete absence of probative evidence to establish that he intended to commit or facilitate a homicide, an essential element of the kidnapping charged in the indictment in this case.

CERTIFICATE OF SERVICE

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