IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER DALE JONES JR. :

Appellant, :

vs. : Case No. SC04-2231

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE COUNTY
STATE OF FLORIDA

REPLY BRIEF

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PRELIMINARY STATEMENT

The record on appeal consists of the original record containing 26 volumes, a supplemental record containing 2 volumes. References to the original record will be designated by volume number, followed by either an “R” or “T” and the appropriate page number. References to the supplemental record will be designated “S” and the volume number, followed by either an “R” or “T” and the appropriate page number.

The prefix “T” indicates transcript from the trial itself. The prefix “R” indicates documents filed with the clerk, transcript of pretrial hearings, transcripts of the Spencer hearing and transcript of sentencing hearing. The Appellant’s initial brief will be designated by the symbol “IB”, followed by the appropriate page number(s) and the State’s reply brief will be by “RB” and the page number(s).

REQUEST FOR ORAL ARGUMENT

Mr. Jones has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jones, through counsel, accordingly urges that the Court permit oral argument.

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ISSUE I- THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING HEARSAY TESTIMONY BY STATE WITNESS AMBRIA EDMONDS

The State contends that this issue is waived because it was not properly preserved for appeal. However, the trial court granted the defense's continuing objection to all of the proposed testimony of Edmonds and as such preserved the matter for appeal (VIII-T558). The State also argues that the Appellant waived his right at trial by conceding to the admission of generalized statements. This an absurd claim because it is the crux of the issue at stake. If the witness made the generalized statements contemplated by the stipulation, there would be no issue. In addition, the initial appellate brief properly states and preserves the issue for which it seeks relief for the Appellant. The State improperly relies upon Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) to bolster their argument that the Appellant simply referenced his complaint with the court, but failed to outline it. The Duest Court contended that an Appellant may not refer to arguments in his or her motion for post conviction relief, but rather must have a further "elucidation". Id. The initial brief clearly states that:

> Edmonds was then allowed to testify to *detailed* statements alleged to have been made by Paul Rosier and Ellen Cuc as they planned the robbery (VIII-576-590) (emphasis added).

The brief further goes on to explain what these conversations entailed and the dynamics of the situation they occurred within. This not only meets the standard set forth by the Duest Court, but also satisfies the State's second complaint that there were no citations referencing the record in the initial brief; see the reference to transcript VIII-576-590. (RB 15)

It is the Appellant's contention that the trial court abused its discretion by allowing Edmonds's testimony to be admitted when it constituted hearsay evidence and was highly prejudicial to the defense. The State cites Trease to describe what constitutes such an abuse, but they never rebut the fact that this case meets this standard. Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990) Edmonds's testimony essentially cleared her and two of the co-defendants of the actual shooting by not only attesting to the events surrounding the incident, but to detailed statements made by the co-defendants. In addition, the State was permitted to rebut the defense theory that the

defendant stayed in the car during the robbery and was unaware of the incident through their reliance on this sole witness. The decision by the court to admit this testimony without testing Edmonds's recollection of others' statements through vigorous cross-examination of the actual speakers is an arbitrary, fanciful, and unreasonable action as outlined by Trease.

The State reiterates that the trial court permitted such testimony on the grounds that it met Sec. 801.6 of the 2000 Edition of Florida Evidence. However, the Appellant does not refute the merit of these grounds, but rather argues that they can only meet the standard of proving the state of mind of a person when the testimony is factually based. (IB 13) This is detrimental to the State for two reasons: (1) proving that the testimony is factually based constitutes hearsay and (2) Rosier and Cuc are the only individuals who could testify to the validity of the testimony. As a result, it is clear that the court erred in either allowing hearsay evidence to be admitted or in admitting highly prejudicial testimony concerning the defendant's supposed state of mind by a witness who had a vested interest in the outcome of the case.

The State recants the testimony by Edmonds in an effort to illustrate that the defendant's state of mind was

one of being aware that a robbery was planned, however, this is irrelevant to the issue at hand. The Appellant does not argue that testimony eliciting one's state of mind is inadmissible, but that the testimony at hand does not meet this standard. Even if it does, the testimony is highly prejudicial and therefore still constitutes a reversible error on the part of the court. This recantation of testimony actually helps the Appellant's case in that the State illustrates that the statements to which the witness is testifying about are solely those of Paul Rosier and Ellen Cuc. When asked if the defendant partook in the conversation, Edmonds replies:

> I *believe* he said that, " I hope the man got money because I hope we're not going on a blank trip." (VIII-T579) (emphasis added)

In addition to the defense not being able to test the validity of such a claim through cross-examination of the individuals making the statements, Edmonds, herself, shows hesitation in answering the question before her. Finally, the defendant's testimony at trial contradicts the witness's claims. As a result, the Appellant was deprived of his theory of defense based upon the inadmissible, prejudicial testimony of a single witness whose own liberty insofar as she cooperated with the State was at stake. The

State contends that the Appellant could still provide a defense on the grounds of cross-examining witnesses and/or submission of his own testimony, but it is exactly these two avenues that were disrupted as a result of this error by the court. The witnesses that could rebut Edmonds's testimony never testified and the Appellant's own testimony was tainted based on the inadmissible hearsay evidence.

The State continues by relying upon King, Duncan, and Taylor to prove the admissibility of the testimony. They claim that an out-of-court statement offered to prove the state of mind of the person who heard the statement is not hearsay because it does not seek to prove the truth of the statement. King v. State, 684 So.2d 1388 (Fla.1st DCA 1996); Duncan v. State, 616 So.2d 140 (Fla.1st DCA 1993); and Taylor v. State, 601 So.2d 1304 (Fla.4th DCA 1992) However, the State fails to address the Appellant's claim that the present case is wholly distinguishable. In those cases, the State was obliged to prove that the defendant had guilty knowledge of the crime and thereafter, the defendants attempted to introduce exculpatory statements to prove that they didn't know what they were doing was a crime. In the present case, the State need not prove that the defendant had guilty knowledge of the crime; therefore these cases are misplaced. The Appellant agrees with the State in that

a statement may be offered and admitted on grounds other than proving the truth of the matter asserted. Foster v. State, 778 So.2d 906, 915 (Fla. 2000) citing Williams v. State, 338 So.2d 251 (Fla.3d DCA 1976) However, the King Court cites State v. Baird to show that "an out-of-court statement which is offered for a purpose other than proving the truth of its contents is admissible *only* when the purpose for which the statement is being offered is a material issue in the case". 572 So. 2d 904 (Fla. 1990) (emphasis added) The state of mind of the defendant is not a material issue in this case, but rather, is only relevant for purposes of the State admitting Edmond's testimony. As a result, these cases do not support the admissibility of Edmond's testimony.

The State argues that the Appellant's references to Daniels is distinguishable in that the Daniels Court admitted such evidence for the purposes of proving a logical sequence of events, not a state of mind, and that the comments weren't made in front of the defendant. Daniels v. State, 606 So.2d (Fla.5th DCA 1992) Firstly, both cases address the admission of testimony where statements were made by another person for a purpose other than proving the truth of the matter. The exact purpose of their admission is irrelevant, it is only important that they

were not used to prove the validity of the statements made. In addition, the issue at hand is that the Daniels Court contended that a more general statement, in contrast to a detailed statement, is better practice and this standard should not oscillate based upon whether or not the Appellant was present. Id.

Finally, the State argues that even if an error was committed, it would not have affected the outcome of the case. The State contends that the witness's statements did not prove any of the elements of the crimes charged and therefore had a negligible effect on the jury verdict. However, there is no proof of the State's contentions. It is not the court's prerogative to play a guessing game at what the jury would have decided if the inadmissible testimony was properly precluded from trial. This court should rule solely based on the fact that the Appellant's constitutional rights were violated. The court allowed inadmissible testimony by a highly prejudicial witness into the trial. In addition, the witness testified to statements made by other individuals whom the defense did not have the opportunity to cross-examine. This is clearly not a harmless error and as such, the case should be remanded for a new trial.

ISSUE II- THE TRIAL COURT ERRED BY IMPROPERLY IMPOSING THE AVOID ARREST AGGRAVATOR

In assessing an appeal, this court has the duty to see if the right rule of law was applied and, if so, whether competent, substantial evidence supports its consensus. Willacy v. State, 696 So.2d 693,695 (Fla.1997); Hurst v. State, 819 So.2d 689,695 (Fla.2002) The State never refutes the Appellant's contention that the rule of law was misapplied, but rather only argues that there is competent substantial evidence to support such an aggravator. The Appellant has reviewed the history of such an aggravator to show that the trial court lowered the standard under which it should evaluate such incidents. The standard of proof set by this court in Urbin v. State, 714 So.2d 411, 415 (Fla.1998) is that "the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination". The State may not speculate about such a conclusion nor may the trial court infer that such a standard has been met when the State has failed to meet its burden. Consalvo v. State, 697 So.2d 805, 819 (Fla.1996); Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993) Furthermore, the mere fact that the victim knows the defendant and could identify him or her is insufficient to prove this aggravator. Hurst at

696. Not only does this case not meet this standard, but the facts are less menacing than Hurst because the victim didn't know the defendant. The trial court was clearly negligent in applying the right rule of law and as such the aggravator should be overturned.

The State claims that the avoid arrest aggravator should stand based upon 3 grounds: (1) the robbery was over and the victim was incapacitated; (2) the defendant knew the victim knew a co-defendant and could therefore identify him; and (3) the victim was disarmed. The State contends that the court found competent, substantial evidence to support these 3 suppositions that would prove the aggravator beyond a reasonable doubt.

For purposes of proving how ill-supported such premises are, we can group together contentions one and three. None of these claims can be verified by competent, substantial evidence for the sole fact that no one was witness to the actual shooting. There are witnesses who testified that the victim struggled from the onset of the robbery, but there are no witnesses who can testify to his demeanor directly before or during the shooting. It is entirely possible that the shooting occurred as a result of the initial struggle being renewed. However, there is no competent, substantial evidence supporting either

contention because no one witnessed the shooting. As a result, the trial court has speculated as to what actually occurred in the midst of the State not meeting its burden of proof. This inference is exactly the type of harmful error that this court has fought against in devising its standard of proof. See Consalvo and Robertson.

The State argues that Dr. Diggs's testimony shows that the victim was incapacitated as indicated by the blows to his head and his positioning on the ground. However, this is wholly subjective. Even an expert's testimony as to the number of blows to a victim's head cannot attest to how that particular victim endured such trauma. In addition, one's positioning on the ground does not refute the fact that a verbal, if not physical, struggle could have developed from this position, thus instigating the shooting. We cannot know the details without there being a witness to the actual shooting, and there is none. As such, any explanation of the events is mere speculation.

The State also reiterates the trial court's reliance upon Willacy v. State, 696 So.2d 693 and Henrey v. State, 613 So.2d 429 (Fla. 1992) to illustrate that this aggravator has been appropriately applied in cases where the defendant is incapacitated. The Appellant has argued that these cases are distinguishable because both victims

were incapacitated through tethering or binding their limbs. The State argues that this makes no difference because they were still “incapable of thwarting his (defendant’s) purpose”. See Willacy. However, the Appellant again reiterates the fact that there was no witness to the shooting; therefore, there is no guarantee to this circumstance. As such, the trial court can only *infer* that the killing was not retaliatory, reactionary, nor instinctive and this is not a permissible measure for upholding the aggravator. See Robertson. The State additionally cites Thompson v. State, 648 So.2d 692 (Fla.1995) as a less factually based case where the aggravator was upheld. However, the State claims that the case at hand is more factual because of Edmond’s “eyewitness testimony”. (RB 42) However, Edmonds was not a witness to the actual shooting, therefore this claim is just false. In addition, this case is distinguishable because the victims knew the assailant personally in Thompson and there is no definitive link to the defendant in the present case.

The State also attempts to indicate that the removal of the victim’s rifle from the premises by co-defendant Edmonds adequately disarms the victim. However, the State exaggerates the standard against which the Appellant claims

the aggravator is wrongly based. All the Appellant must show is that avoiding arrest was not the *dominant or sole* factor for the shooting. See Urbin. (emphasis added) There is no need to show that the cause or instigator was some significant threat or struggle, but just that some other factor was the dominant cause. This has clearly been demonstrated by the Appellant.

In addressing the second contention, the trial court falsely claimed that on more than one occasion Ellen Cuc was present in the house during the time of the robbery. They first state "They went back to their car and then returned to the victim's front door where they forced themselves into his home to rob him at gunpoint." (XVI, R1515) In addition, the court found that "The Defendant forced the victim on his knees at gunpoint while the others- Ellen Cuc, Paul Rosier, and Ambria Edmonds- robbed him of his cash…" (XVI, R1515) Finally, the court stated that "He (the victim) was outnumbered by four to one…" (XVI, R1515) Based on the foregoing acclaimed facts, the court found that since the victim knew and could identify Cuc who partook in the robbery, he could identify the defendant. This blatantly false conclusion was the basis upon which the court ruled in respect to the aggravator. The State's circumstantial evidence contradicts the

testimony given at trial by both Edmonds and Jones and therefore does not meet the court's standard of being competent or substantial.

The State argues that the court correctly concluded that Cuc was involved in the robbery. They state that her reconnaissance mission beforehand and her sentencing prove such an involvement. Firstly, the victim was unaware that the two encounters with Cuc in regards to buying a beer and inquiring into whether or not blacks could buy beer were related to the robbery. An average person would not assume such a link and there is no evidence indicating that the victim did. In addition, Cuc's sentence does not support this contention. The victim was unaware of all of the evidence upon which the jury convicted Cuc with and therefore he could not have reasonably concluded that she was involved on the same grounds. The victim did not know the defendant and could not even draw a reasonable link between any of the accomplices known to him and the defendant. Therefore, there is no competent, substantial evidence that begins to meet or exceed the standard of proof established in Hurst.

The State cites various cases to illustrate that there are instances in which this court has upheld the aggravator, even when the victim was unknown to the

defendant prior to the crime. However, these are wholly misplaced. The State first cites Routly v. State, 440 So.2d at 1264, but in this case the "the defendant knew that the victim knew him and could later provide the police with his identity." In addition, the Routly Court actually distinguishes their case from those in which the events leading up to the shooting are unknown, whose motive cannot be determined, and which should not be speculated about. Id. citing Menendez v. State, 368 So.2d 1278 (Fla.1979). The Routly Court explicitly states that in those cases there is no saying whether or not a struggle ensued and was the cause of the shooting, therefore we cannot infer such circumstances and apply the aggravator. The State next cites Burr v. State, 466 So.2d 1051 (Fla.1985) that is clearly distinguishable from the present case in that the trial court based the aggravator on the pattern of robberies and shootings that the defendant had committed in an effort to continue his rampage by eliminating witnesses. There is no pattern of such negligence in the present case. Additionally, the court's reasoning in Martin and Griffin is wholly inconclusive. Martin v. State, 420 So.2d 583 (Fla.1982) and Griffin v. State, 414 So.2d 1025 (Fla.1982) There is no indication to the reasons why the court upheld the aggravator, therefore they cannot adequately support

the State's case. In both cases, the assailants went beyond a mere robbery and kidnapped their victims and committed other violations against them before eventually shooting them. The drastically different incidents indicate that the reasoning of the court is probably distinguishable from the present case. In addition, this court has held that the mere fact that the victim might be able to identify an assailant is insufficient. Bates v. State, 465 So.2d 490, 492 (Fla. 1985)

The Appellant further cited cases in which other elements contributed to the finding of the aggravator in an effort to survey the facts leading to such rulings. See Rodrigues v. State, 753 So.2d, 50 (Fla.2000); Jennings v. State, 718 So.2d 144, 150 (Fla.1998); Derrick v. State, 641 So.2d 378, 380 (Fla.1994); and Trease v. State, 768 So.2d 1050, 1056 (Fla.2000) The State mishandled these cites by stating that they are distinguishable and wholly irrelevant in that the victims knew the assailants and that there need not be a statement as to the defendant's intent. The Appellant expressly agrees with the State, but only offered these cases to show other elements that the trial court *could* consider. Since both sides agree that these elements are not present in the instant case, we need not evaluate them any further. In fact, there is no substantial,

competence evidence supporting the avoid arrest aggravator and without speculating as to the motive the trial court could not have found such evidence. As such, the Appellant asks that this aggravator be overturned.

ISSUE III- THE SENTENCE OF DEATH IS NOT PROPORTIONAL TO OTHER SIMILAR CASES

The Appellant contends that after striking the avoid arrest aggravator, a proportionality review would show that the death penalty is not the proper punishment. The State cites several cases against this claim, but all are distinguishable from the case at hand. The State relies upon Sliney v. State, 699 So.2d 662 (Fla.1997) as the most analogous case, however it is wholly distinguishable. Sliney was accused of premeditated first-degree murder and robbery with a deadly weapon *in addition* to felony murder. Also, the Sliney court maintained the avoid arrest aggravator. Finally, the court noted that the incident was so particularly brutal that they granted an upward departure on the robbery charge to life in prison. Obviously these differences set Sliney's case apart from the present and do not disprove the disproportional argument. Pope v. State, 679 So.2d 710, 716 (Fla.1996) and Geralds v. State, 674 So.2d 96, 105 (Fla.1996) are also distinguished on the grounds that they include additional

aggravators that would obviously make the death penalty more proportional. The remaining cases of Evans v. State, 838 So.2d 1090, 1097, 1098 (Fla.2002), Shellito v. State, 701 So.2d 837 (Fla.1997), Melton v. State, 638 So.2d 927 (Fla.1994), Hayes v. State, 581 So.2d 121 (Fla.1991), and Young v. State, 579 So.2d 721 (Fla.1991) are all distinguishable on the grounds that they do not have the same aggravators and actually have less mitigation. The Appellant acknowledges the fact that this review is not a comparison of the number of mitigators versus aggravators, but rather looks at the "totality of the circumstances in a case…to compare it with other capital cases". Porter v. State, 564 So.2d 1060, 1064 (Fla.1990); See also Fitzpatrick v. State, 900 So.2d 495, 526 (Fla.2005). However, if the circumstances, for example the aggravators and mitigators, that are taken into account are not similar, then the cases are not comparative. The Appellant even understands the breadth of mitigators that can be taken into account, so would reason that at the very least the aggravators should be the same, and this is not the case.

The Appellant maintains that case law will illustrate the disproportional nature of the death penalty if the avoid arrest aggravator was struck. Terry v. State, 668

So.2d, 954 (Fla.1996) is a comparable case in which the totality of the circumstances was insufficient to impose death. The State argues that this case is distinguishable based upon their arguments in section two, but this issue is null and void.(RB 54) The Appellant only asks the court to analyze the proportionality of his sentence if the avoid arrest aggravator is struck, which would show that the State's argument in section two is without merit. However, assuming arguendo, there was no witness to the actual shooting, therefore the court cannot determine, without speculation, whether this was a robbery gone bad or what the motive behind the shooting was. As the Terry Court has stated, the inconclusive nature of the shooting is reason enough to overturn the death penalty. Id. at 965. In addition, the State concedes that the court's consideration of an aggravator of an armed robbery/pecuniary gain in conjunction with no statutory mitigators and little weight to any non-statutory mitigators mirrors the case at hand. The court should therefore consider the fact that the Terry Court found that these set of circumstances do not meet the standard set out in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes" and as such overturned the sentence of death. Id.

Both Sinclair v. State, 657 So.2d 1138 (Fla.1995) and Thompson v. State, 647 So.2d 824 (Fla. 1994) are comparable in that the only aggravator found was that the felony murder was for pecuniary gain and little to no weight was given to the mitigation. The State argues that both cases are distinguishable in fact because substantial weight was given to some of the mitigating circumstances, however, the Appellant contends that when taking all 7 of his mitigators into account that the totality of the circumstances would remain analogous. In addition, the State argues that Thompson is distinguishable on a factual basis. However, the State is once again speculating and refusing to admit that there were no witnesses to the events immediately prior to and during the shooting itself, as in Thompson. The State concludes by citing some cases in which the death penalty was upheld when only one aggravator was found and where the mitigation was given little weight. See Blackwood v. State, 777 So.2d 399 (Fla.2000); Burns v. State, 699 So.2d 646 (Fla.1997); and Ferrell v. State, 680 So.2d 390. However, none of the aggravators are equivalent to the one at hand and therefore these cases are not comparable since each aggravator, in light of the total circumstances, is subjectively given different weight.

ISSUE IV-THE DEATH PENALTY WAS IMPROPERLY IMPOSED BECAUSE FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

The State first argues that this issue should not be addressed because it was not properly preserved for appeal. However, the Appellant's reference to the motion and its location within the record suffices in preserving the issue. The Duest standard only asks for further elucidation, which is found in the motion referenced in the initial brief in Volume II- R201-3 of the record. See IB49; Duest v. State, 555 So.2d at 852 In addition, the Appellant explicitly stated that the motion holds that "Since the statute upon which the Defendant's sentence was imposed is unconstitutional, the death penalty could not be properly imposed." (IB 49) The purpose and support dictated in the motion is sufficiently elucidated in this statement, and as such, has been properly preserved for purposes of this appeal. Additionally, it is ridiculous to claim that this is insufficient when the State continuously references the record through citing in their reply. If this is an improper mode of reference, then the State is equally culpable. In addition, the State claims that the issue is not preserved because the Appellant did not cite the status of the motion as per the trial court. However, the initial brief plainly states that "the trial court denied the

motion and the argument was renewed during the penalty phase portion of the trial". (IB 49)

The Ring court declared that the death penalty was unconstitutional because the jury only made a recommendation of death and the judge made the final ruling in a hybrid system. Ring v. Arizona, 536 U.S. 584 (2002); See VII-R201. As a result, the judge was the arbiter of facts to the extent that he found certain aggravating circumstances that supposedly called for the death penalty. VII-202 In instances where the penalty exceeds that which would be given based upon the facts in the case, the jury must find that fact beyond a reasonable doubt. VII-R202

The State continues by citing examples of constitutional provisions of the death penalty that have not been explicitly questioned by the Appellant in an effort to show the penalty's legitimacy. However, the consequent of the Appellant's narrowly tailored argument is ruling that the death penalty is unconstitutional, thus making the other aspects of it irrelevant for review.

Finally, the State argues that this court has rejected challenges under Ring for similar cases. (RB 61) However, the State only cites cases where a prior violent felony was taken into account. See Robinson v. State, 865 So.2d 1256, 1265 (Fla.2004) and Banks v. State, 842 So.2d 788, 793

(Fla.2003) These cases are clearly distinguishable from the Appellant's in the make-up of the aggravating circumstances. As a result, the Appellant maintains that the death penalty is unconstitutional on 6th Amendment grounds.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities Christopher Dale Jones, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issue I – reversal of conviction with remand for a new trial.

As to Issue II, III and IV – vacate the death sentence and remand for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Leslie T. Campbell, Esquire, Assistant Attorney General, 1515 Flagler Drive 9th Floor, West Palm Beach, FL 33402 on this ____ day of April 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12 point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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