IN THE SUPREME COURT OF FLORIDA

JOHN M. BUZIA,	)	
	)	
Appellant/Cross-Appellee,	)	
	)	
vs.	)	CASE NO. SC04-582
	)	
STATE OF FLORIDA,	)	
	)	
Appellee/Cross-Appellant.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

AMENDED REPLY BRIEF OF APPELLANT / ANSWER BRIEF OF CROSS-APPELLEE

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(386) 252-3367

ATTORNEY FOR APPELLANT/
CROSS-APPELLEE

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SUMMARY OF THE ARGUMENT

1) In the sentencing order the trial court did not give any weight to the felony-murder (kidnaping) aggravating circumstance. The trial court did not abuse its discretion. The state did not charge Buzia with kidnaping; the state was "aggravator shopping"; and the kidnaping of Thea Kersch was incidental to the murder of Charles Kersch.

2) In the sentencing order the trial court did not give any weight to the pecuniary gain and felony-murder (kidnaping) aggravating circumstances because the trial court believed that the primary motive of the murder of Charles Buzia was witness elimination.

IN THE SUPREME COURT OF FLORIDA

JOHN M. BUZIA,)
)
Appellant,)
)
vs.) CASE NO. SC04-582
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

POINT I

IN REPLY AND IN SUPPORT THAT THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

The appellant relies upon the initial brief in reply to the appellee.

POINT II

IN REPLY AND IN SUPPORT THAT THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE.

The state argues in their answer brief that there was substantial competent evidence to support the trial court findings that the dominant motive of the capital felony was to avoid arrest. (State Brief Pg 43) The substantial competent evidence relied upon the trial court in the sentencing order is as follows:

1) The appellant was well known to the victims;
2) Thea Kersch was an impediment to the appellant leaving the crime scene without detection;
3) The appellant did not immediately flee the Kersch home;
4) The appellant assaulted the victims rather then restrain them;
5) There was no other reason to kill Charles Kersch than witness elimination;

The appellant asserts that the foregoing is not substantial competent evidence to support the witness elimination aggravating factor. In fact, there is substantial competent evidence to refute the witness elimination factor including:

1) Buzia confessed that he left Thea Kersch as a witness against him in the den, using duct tape to try to lock Thea Kersch in the bedroom so that he had time to get away;

2) Buzia confessed that he never used the sharp side of the axe, and when he struck Kersch with the axe his intention was to slow down Charles Kersch so that he could get out of the house. The appellant did not hit Charles Kersch with a full swing of the axe but hit him hard enough to "knock him silly";

3) Buzia confessed that after assaulting Thea Kersch, he was searching the home for valuables when Charles Kersch came home. This would explain why Buzia did not immediately flee the Kersch home after assaulting Thea Kersch;

4) Buzia used duck tape to keep Thea Kersch in her room, contrary to the state's assertion that Thea Kersch was assaulted rather than restrained.

The trial court state must prove by positive evidence (rather than by speculation**,** default, or elimination) that the dominant motive was to eliminate a witness. ***Farina v. State***, 801 So. 2d 44 (Fla. 2001)**; *Scull v. State***, 533 So.2d 1137 (Fla. 1988); ***Jackson v. State***, 592 So.2d 409 (Fla. 1986); ***Connor v. State***, 803 So. 2d 598 (Fla. 2001). The trial court sentencing order concludes that there was no other reason to kill Charles Kersch than witness elimination. The trial court improper ly found that this aggravating factor exists based upon speculation or by process of elimination.

The evidence supports that the appellant did not intentionally murder

Charles Kersch, or if he intentionally murdered Charles Kersch, he did so during cocaine withdrawal or delirium. As such, the state has failed to prove this factor beyond a reasonable doubt. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT III

IN REPLY AND IN SUPPORT THAT THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The state argues in their answer brief that this court's has upheld the heinous, atrocious and cruel factor numerous times and relies upon the decision in ***Lamb v. State***, 532 So. 2d 1051 (Fla. 1988). The ***Lamb*** case is distinguishable from the instant case.

In ***Lamb*** the victim had a defensive wound and was struck six times in the head with a claw hammer. Even though Lamb delivered each blow with sufficient force to penetrate the skull, the victim did not die instantaneously. The evidence shows that he fell to his knees and then to the floor after Lamb pulled his feet out from under him. The victim moaned, rolling his head from side to side, until Lamb kicked him in the face.

In the instant case, when Charles Kersch entered the home, Buzia hit him

and Kersch went down. When Kersch fell he hit his head real hard on the cement tile floor and was unconscious. This account by Buzia is supported by testimony of the Medical Examiner, where one of the skull fractures suffered by Kersch was a result of a rapid fall to the floor. The appellant admitted that he struck Charles Kersh with the axe, but never used the sharp side of the axe because his intention was to slow down Charles Kersch so that he could get out of the house. Buzia did not hit Kersh with a full swing of the ax but hit him hard enough to "knock him silly." This account is supported by the testimony of the blood splatter expert who testified that the blunt force object blow to Charles Kersh's head was a medium velocity strike to the head.

In ***Lamb*** the repeated blows to the head did not cause death, and there was evidence presented that the victim lingered and suffered throughout the attack. In the instant case, Buzia confessed that the initial blow to Charles Kersch caused unconsciousness. When Kersch appeared to be regaining consciousness, Buzia struck him with the axe. The Medical Examiner testified that the blow to the victim's head with the axe would cause immediate loss of consciousness and death within minutes.

Despite the claims of the state, the testimony and physical evidence supports the conclusion that Charles Kersch was killed quickly after entering his home. The

injury to Charles Kersch's head when he fell to was sufficient to immediately stun him and cause unconsciousness. There was no suggestion that Buzia intended to kill Charles Kersch or intentionally torture Charles Kersch. The evidence is rather that Buzia wanted to rob Charles and Thea Kersch, and render them incapacitated so that he could get away and get high.

The state presented absolutely no testimony from the medical examiner to support any conclusion that there was excessive pain or torture involved here. There was no testimony the victim was acutely aware of impending death. The testimony and evidence is all to the contrary; the victim here was rendered unconscious in a very brief time, with little suffering and pain. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT IV

IN REPLY AND IN SUPPORT THAT THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

The state in their answer brief trial court argues that this court's has upheld the cold, calculated and premeditated factor in similar cases and cites the decision in ***Lamb v. State***, 532 So. 2d 1051 (Fla. 1988) and ***Rodriguez v. State***, 753 So.2d 29 (Fla. 2000).

In ***Lamb*** there was evidence that Lamb planned the burglary and theft; that he planned violence to the victim in perpetrating the theft; that he brought a weapon to the scene, and once there, exchanged it for one better suited for the crime; and that, after searching the victim's home and committing the felony, he concealed himself and waited for the victim to return.

In the instant case there was no evidence presented that Buzia had planned the initial attack of Thea Kersch. There was no evidence or finding that Buzia brought a weapon to the scene. Although the trial court concluded that Buzia waited for Charles Kersh to come home to kill him, this was pure speculation because there was no evidence presented to support this conclusion. In fact, Buzia

confessed that after assaulting Thea Kersch he was searching the home for more valuables when Charles Kersh came home.

In ***Rodriguez*** , there was a planned ruse to enter the apartment and a back-up plan to force his way into the apartment if that plan failed. Moreover, like ***Lamb***, Rodriguez armed himself with a loaded handgun and two pairs of latex gloves so as not to leave any fingerprints in the apartment if the initial plan did not work. Also, Rodriguez fired an additional shot into each victim from close range to make sure they were dead. There was evidence that none of the elderly victims offered any resistance and each victim was shot while seated and fully compliant. Finally, Rodriguez told his girlfriend that he made certain that the victims were dead.

In the instant case, there was no evidence introduced that Buzia had any plan to commit any crime when he arrived at the Kersh home. Buzia was due to the Kersh home that morning to do repairs, so he had an independent reason to come to the Kersh home to talk to Charles Kersh. Buzia brought no weapon to the Kersh home. Buzia left Thea Kersch alive in the house, did not strike Charles Kersh with a full swing of the axe, and in his own words only assaulted Charles Kersh to the point of giving Buzia a safe getaway.

The murder of Charles Kersch lacked heightened premeditation, therefore, the trial court erred in finding this aggravating circumstance. The conclusion of

the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT V

IN REPLY AND IN SUPPORT THAT THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE ONLY ONE VALID AGGRAVATOR EXISTS, WHILE THE MITIGATION IS SUBSTANTIAL.

The appellant relies upon the initial brief in reply to the appellee.

POINT VI.

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL UNDER ***RING V. ARIZONA***.

The appellant relies upon the initial brief in reply to the appellee.

ANSWER ON CROSS-APPEAL

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO WEIGH THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF CHARLES KERSCH WAS COMMITTED DURING THE KIDNAPING OF THEA KERSCH.

The state argues in their initial brief that the trial judge mistakenly believed that he could not consider the kidnaping as an underlying felony for the aggravating circumstance of during-a-felony. (State Brief, Pg 86) The state's claim misinterprets the trial court sentencing order. The trial court specifically considered and found that the state proved that a kidnaping occurred.

The state should give the trial court more credit. The trial court was troubled that the state was using alternative theories to pile on aggravating factors, but nonetheless correctly recognized the state's right to do so. The trial court recognized that the state would concede that the state could not seek both the felony-murder and pecuniary gain aggravating factor where the underlying felony was robbery or burglary (theft) because that would be an improper doubling of aggravating factors. The state chose to argue that felony murder applies on the uncharged felony of kidnaping which arguably occurred because Buzia moved the

unconscious Thea Kersch's body from the hallway to the back bedroom before Charles Kersch came home. The trial court also did what it legally could about the state's conduct and that was to not give the aggravating factor any weight. On appeal, this court should uphold the trial court's legitimate sentencing action.

It is well settled in law that this Court will not reweigh or reevaluate the evidence adduced to establish aggravating circumstances. ***See Brown v. Wainwright***, 392 So.2d 1327 (Fla. 1981) Florida's death penalty statute, section 921.141, Florida Statutes, directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. The jury performs that function only to recommend a sentence to the trial judge. It then becomes the responsibility of the trial judge to weigh evidence of aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to impose.

A trial court's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record; "competent substantial evidence" is tantamount to legally sufficient evidence. ***See Almeida v. State***, 748 So. 2d 922 (Fla. 1999), cert. denied, 528 U.S. 1181, 120 S. Ct. 1221, 145 L. Ed. 2d 1120

(2000) When reviewing a trial court's ruling on an aggravating circumstance, the Appellate Court assesses the record evidence for its sufficiency only, not its weight. The Supreme Court of Florida is not a fact-finding body when it sits to hear appeals in death cases, and would usurp the constitutional role of the trial court, and violate due process, even assuming it had some authority to manufacture aggravating factors the lower tribunal has not found.

Here the trial court found that the state had proved each aggravating factor the state requested beyond a reasonable doubt. The trial court gave no weight to during-a-felony aggravating factor because he believed that although the aggravating factor exists, it was incidental to the murder. There was no abuse of discretion by the trial court shown by the state in their initial brief.

POINT II

THE TRIAL COURT DID NOT ERR IN FAILING TO WEIGH EITHER THE DURING -A- ROBBERY/ BURGLARY AGGRAVATING CIRCUMSTANCE OR THE PECUNIARY GAIN CIRCUMSTANCE.

The state argued in their initial brief that the trial judge eliminated both aggravating factors because he believed that each were doubled with the other. (State Brief page 89) Again, the state misinterpreted the trial court's sentencing order.

The trial court found that during-a-felony (kidnaping) aggravating circumstance was proven beyond a reasonable doubt, and that the pecuniary gain aggravating factor was proven beyond a reasonable doubt. The trial court assigned each of these factors no weight because in his discretion as the trial judge rendering a sentence, he believed the facts and circumstances of this case supported giving them no weight.

The trial court provided a detailed and reasoned sentencing order explaining why he gave weight to all the aggravating and mitigating factors. He gave no weight to the during-a-felony aggravating factor and pecuniary gain aggravating factor because, after hearing all the evidence and argument, he believed that the

primary motive for the murder was to avoid arrest. The sentencing judge in a capital case is statutorily required weigh each aggravating and mitigating factor that is present. In performing this function the trial court gave great weight to the avoid arrest aggravating factor.

The law regarding this Court's review of a trial court's finding of an aggravating factor is well settled. It is not this Court's function to reweigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt; that is the trial court's job. ***Owen v. State***, 862 So.2d 687, 698 (Fla. 2003) Rather, this Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether substantial competent evidence supports its finding. ***Way v. State***, 760 So.2d 903, 918 (Fla. 2000) Concerning the weight given mitigating factors, it is within the discretion of the sentencing court to assign relative weight to each mitigating factor, and the sentencing court's finding will not be disturbed absent a showing of abuse of discretion. ***See Trease v. State***, 768 So.2d 1050, 1055 (Fla.2000); ***see also Elledge v. State***, 706 So.2d 1340, 1347 (Fla.1997).

Here the trial court found that the state had proved each aggravating factor the state requested beyond a reasonable doubt. The trial court gave no weight to

during-a-felony and pecuniary gain aggravating factors because he believed that although the aggravating factors exist, they were incidental to the murder. There was no abuse of discretion shown by the state in their initial brief.

It should be noted that Appellant/Cross-Appellee does not agree with the trial court's conclusion that the primary motive of the murder was to avoid arrest. ***See*** Point II If Buzia was concerned about avoiding arrest, he would not have fled the Kersch home with their automobile and checkbook. Immediately after the murders Buzia got high. When arrested less then 24 hours later, Buzia was in a substance induced daze when confronted by police. Once at the police station Buzia made a full confession.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to order a new penalty phase or sentence the appellant to life imprisonment as to Point I, II, III & IV; sentence appellant to life imprisonment as to Point V & VI of the Reply Brief; and find that the trial court did not commit error as argued by the State in their Initial Brief Points I & II.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(386) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. John Buzia, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 13th day of June, 2005.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER