

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1234

STEVEN DOUGLAS HAYWARD

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL
CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA,
(CRIMINAL DIVISION)

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Steven Douglas Hayward, Defendant below, will be referred to as "Hayward". Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R", to supplemental materials by "SR", to Hayward's initial brief by "IB" and to his supplemental initial brief by "SIB", followed by the volume and page number(s).

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement contained in its answer brief.

SUMMARY OF THE ARGUMENT

Supplemental Issue XI - Hayward's challenge to the robbery conviction has not been preserved for appeal. However, if the merits are reached, there is substantial, competent evidence to affirm the conviction for robbery and for felony murder with robbery as the underlying felony.

ARGUMENT

SUPPLEMENTAL ISSUE XI

**THE EVIDENCE SUPPORTS HAYWARD'S ROBBERY CONVICTION
(restated)**

In his supplemental initial brief, Hayward asserts that the State did not prove that he committed an armed robbery. This issue is not preserved for appeal as trial counsel had no good faith argument to challenge Count II, the armed robbery count, when the matter was raised by the trial court at the time other motions for judgments of acquittal ("JOA") were made. (R.28 2040). However, counsel did move for a JOA on the felony murder/robbery count, later conceding that there was evidence of attempted robbery. The JOA was denied properly. (R.28 2035-40, 2186-89; R34 2623-24, 2675). The evidence presented at trial supports the denial of the JOA on the felony murder/robbery and supports the finding of the jury that Hayward was guilty of armed robbery should this Court reach that issue.

Hayward did not challenge directly Court II, the armed robbery charge. Counsel stated that he could not in "good faith" make an argument against Count II. (R.28 2040). As such Hayward has not preserved his challenge here. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding for issue to be cognizable on appeal, it must be specific contention asserted below, unless fundamental error can be shown). Furthermore,

while Hayward moved for a new trial, his motion and new trial were insufficient to put the court on notice that he was challenging the robbery charge or to preserve the matter for appeal. In his motion for new trial, Hayward stated: "1. That the verdict is contrary to law or the weight of the evidence." (R.8 1215). This was followed by counsel's argument that he was relying upon the argument made during trial. (R.34 2623-24). Although he challenged the felony murder theory with robbery as the underlying felony at the close of the State's case, such appears limited to a temporal argument, namely, that "The State failed to establish a prima facie case that the **killing occurred during the commission of the underlying robbery.**" (R.28 2035-40) (emphasis supplied) Further, the matter was not re-raised at the close of the evidence which included Hayward's account of the crime. Also, during the charge conference, Hayward offered that the evidence supported a finding of attempted robbery. (R.29 2186-87). For the Court's convenience, the State will address the robbery aspect of the case, which in turn will likewise establish the basis for affirming Count II, armed robbery. In so doing, the State relies upon and reincorporates its analysis for Issue IV contained in its answer brief.

A *de novo* standard of review applies to motions for JOA. Pagan v. State, 830 So.2d 792 (Fla. 2002). This Court stated:

In reviewing a motion for judgment of acquittal, a *de*

novo standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. ... Because the evidence in this case was both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases.

Pagan, 830 So.2d at 803 (citations omitted). See Conde v. State, 860 So.2d 930, 943 (Fla. 2003) (noting where State produced direct evidence, court's determination will be affirmed if record contains competent, substantial evidence to support ruling); Crump v. State, 622 So.2d 963, 971 (Fla. 1993). When a defendant seeks a JOA, he "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). "The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal." Lynch, 293 So.2d at 45.

In Deparvine v. State, 2008 WL 4380919, 18 (Fla. 2008), this Court stated:

"Generally, an appellate court will not reverse a conviction that is supported by competent, substantial

evidence." *Reynolds v. State*, 934 So.2d 1128, 1145 (Fla. 2006) (citing *Pagan v. State*, 830 So.2d 792, 803 (Fla. 2002)). "If, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Reynolds*, 934 So.2d at 1145. "However, where a conviction is based wholly upon circumstantial evidence, a special standard of review applies." *Darling v. State*, 808 So.2d 145, 155 (Fla. 2002) (citing *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982)).

Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.

Darling, 808 So.2d at 155 (quoting *State v. Law*, 559 So.2d 187, 188 (Fla. 1989)). Therefore, "'circumstantial evidence can be sufficient to sustain a conviction' provided that the evidence is (1) 'consistent with the defendant's guilt' and (2) 'inconsistent with any reasonable hypothesis of innocence.'" *Delgado v. State*, 948 So.2d 681, 689-90 (Fla. 2006) (quoting *Orme v. State*, 677 So.2d 258, 261 & n. 1 (Fla. 1996)).

Deparvine v. State, 2008 WL 4380919, 18 (Fla. 2008)

It is the State's position that the special test for circumstantial evidence does not apply here as Roosevelt McDowell ("McDowell") gave direct testimony as to what he saw and Hayward confessed to portions of the crimes, including being at the scene, witnessing a robbery, hearing the "robber" tell

Destefano to "give it up" after which he was shot, and going through Destefano's car. The jury could draw the conclusion that the shooting was committed during a robbery or attempted robbery, as conceded by Hayward (R.29 2186-87), thus, a felony murder and robbery were committed. Such was supported by the respective postures and movements of the parties, the conversations as reported by McDowell and Hayward which took place before and during the shooting, the missing property, and the blood evidence. The State's evidence rebutted Hayward's theory that someone else did the shooting as McDowell heard the victim plead he had nothing more (confirmed by Hayward) and saw Hayward standing over his victim just after Destefano shot his assailant.¹ Furthermore, Hayward took the .357 magnum gun owned by his victim, Daniel Destefano ("Destefano"), and a bloody ten dollar bill was found in his possession after he had reported that he had been robbed or used all his cash on drugs. Additionally, Destefano declared that he had shot at the person who had robbed him. Hayward's blood was found on Destefano's clothes, in his jeans pocket, around his car, under the lamp post, on a wall heading toward Hayward's rooming house, and on

¹ While much is made of McDowell's testimony regarding a 10 to 15 minute gap between the first and final shot, it is clear from the entirety of his testimony that there was confusion regarding minutes and seconds. Moreover, it is up to the jury to determine the facts. Here, they apparently determined it was seconds McDowell was referring to when he reported hearing two shots and right after a third louder shot.

the murder weapon found in the rooming house where Hayward stayed with his girlfriend, Dorothy Smith ("Smith"). Based on this evidence and under either JOA standard, the challenge to the felony murder/robbery charge was denied properly. Moreover, this evidence also supports the robbery conviction.

First degree felony murder is: "(1)(a) The unlawful killing of a human being: ... 2. The unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate ... d. Robbery" §782.04(1)(a)(2) Fla. Stat. Robbery is defined as: "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." §812.13(a), Fla. Stat.

Here, the State established through forensic evidence as well as DeStefano's dying declaration, Hayward's police statement, Smith's testimony, and McDowell's eye-witness account that Destefano was accosted at gun point and robbed. The testimony shows that Destefano was ordered to "give it up" to which he replied "I don't have no more." Destefano was shot twice, once in the leg, and based on the trajectory, a second time in the chest as he was kneeling and Hayward was standing

over him. This establishes that Destefano was attacked at gun point, threatened with violence, and ordered to "give up" his possessions, after which Destefano's gun and cash were taken. From this, the robbery was proven as Destefano was forced at gun point to give up his property and/or it was taken from him by force.

The felony murder was established as Destefano was shot during the course of the robbery. He was fatally shot in the chest as Hayward, already shot by Destefano, proceeded to go through his pants pockets and car for valuables, eventually obtaining cash and a gun. This was proven based on the blood and physical evidence, as well as McDowell's testimony that Destefano was on the ground as the bleeding Hayward searched his person and car. This rebuts the defense theory that Hayward merely watched as someone else robbed Destefano.² As Hayward was

² Rene Edwards ("Edwards"), Destefano's girlfriend, reported that he carried a silver .357 magnum gun and little cash, maybe ten dollars, on his morning paper route. Hayward confessed to having had all of his money taken, or used in a drug purchase. Smith testified that on the morning of the murder, Hayward gave her a bloody ten dollar bill. Smith also recalled that Hayward sold a silver revolver shortly after the murder. Destefano was shot with a .22 gun which was later found hidden in a location to which Hayward had access, and the gun had Hayward's blood on it. Also, Hayward's blood was on Destefano's jeans and in his pocket. (R.24 1461-63; R.26 1745, 1750-51, 1772-75; R.27 1859-60, 1863-64) When analyzing a motion for JOA, all reasonable inferences must be afforded the non-moving party, in this case the State. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974) (holding defendant seeking JOA "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to

looking through the car, Destefano limped from the scene and reported to Officer Grecco that he had been robbed and shot by a black male, and that he had returned fire, but did not know if he had hit his target or what happened to his gun. Hayward's blood was found in the pocket and on Destefano's jeans as well as in his car. Also, Hayward's blood was found on the .22 caliber gun/murder weapon along with items taken from his car. Shortly after the murder, Hayward was seen in possession of a ten dollar bill with blood on it, yet Hayward told the police he had only change in his pockets at the time and had no paper currency. Hayward admitted taking Destefano's gun and items from the car. Destefano was known to carry small amounts of cash during his morning paper runs. (R.24 1458-61 1516-30, 1569-70, 1576-77; R.25 1580-92, 1604-11, 1616-30, 1637-40, 1652-68, 1682, 1690-94, 1696-97 1772-75; R27 1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; R.28 2009-20). Such is substantial, competent evidence supporting felony murder with the underlying robbery. Likewise, it supports the robbery conviction. It rebuts Hayward unreasonable theory of innocence that he just watched Destefano get robbed and shot, only later

the adverse party that a jury might fairly and reasonably infer from the evidence"). Based on this evidence, the reasonable inference is that Hayward ordered Destafano, at gun point to "give it up," then after putting his victim in fear, shot him and took his case and gun. Destefano died of hos wounds, thus, both felony murder and robbery were established beyond a reasonable doubt.

taking his gun and other items.

Hayward points to Kinsler v. State, 873 So.2d 551 (Fla. 5th DCA 2004) for support that the robbery was an afterthought of the murder. It appears Hayward is arguing a time differential between the end of the murder and the robbery. Kinsler does not undermine the State's case as the record establishes that the robbery and murder were completed contemporaneously.

Here, Destefano is told to "give it up" and pleads with his assailant that he has nothing more to give. At the same time, Destefano is shot with Hayward's .22 caliber weapon and in turn shoots Hayward with a .357 magnum. McDowell testified: "Well, I heard the first two shots and then I heard him, the guy say, 'I don't have no more.'" Continuing, McDowell stated: "Right thereafter he heard the big shot went off. Right after that the third the big shot went off is what I heard." Right after the third shot, McDowell opened his door and saw Hayward, with his hand bleeding, standing over the kneeling Destefano and rifling through his pockets before taking Destefano's gun and paper currency.³ (R.24 1520-21). The reasonable inference, favorable to the State, is that there was merely one attacker, and that attacker who was shot, was Hayward. Together, this

³ Destefano's girlfriend testified that he would carry his gun and very little cash, maybe ten dollars during his early morning route. As such, there is evidence countering the defense theory and it would be an issue for the jury to determine whether the robbery entailed both the gun and currency.

evidence shows that there was a completed robbery and killing and supports the felony murder theory of prosecution as well as the robbery conviction.

Similarly, Clark v. State, 609 So.2d 513, 515 (Fla. 1992) does not further Hayward's cause. The evidence shows that an armed Hayward is demanding Destefano "give it up" and shoots as he learns Destefano has nothing more. This is quite different from the situation in Clark where the motive for the killing was something other than robbery and only after the victim was dead did that defendant think to take money and property. Id. at 515.

Furthermore, the State established the identity of the shooter and countered Hayward's hypothesis of innocence. While the State rejects the suggestion that this is a circumstantial evidence case, it offers that Hayward's hypothesis of innocence must be reasonable. Here, the hypothesis of innocence is not only unreasonable, but it was rebutted. Hayward claimed he was a witness to Destefano's early morning robbery and murder. In his ever changing versions of what happened, Hayward settles on the version which has him at the convenience store between 3:00 and 4:00 a.m. only to witness Destefano being confronted by a black male who tells him to "give it up." After shooting the victim, the black male is claimed to have dropped his gun and run off. Hayward maintains that he picked up this gun, but

dropped it only to have it discharge and shoot him in the hand.⁴ After denying to having searched Destefaon's person, Hayward admits to getting into the car to see if there is anything he might take. Only after the taking of the gun, and searching of the car, does Hayward come to the "realization" that he had been shot and it seen standing under a light to check his hand.

To counter this "theory of innocence", the State points to the many different versions of Hayward's account including that he initially told his girlfriend, Dorothy Smith ("Smith"), that he was robbed and shot by two assailants, but had Smith confirm for the police that she and Hayward fought that night and she had stabbed him. The ever changing versions show Hayward's lack of credibility, and undercut his hypothesis of innocence. This is furthered by McDowell's testimony that he saw a man, bleeding from his hand, standing over Destefano and going through his pockets and the car before moving away and standing under a light post to look at his hand. The DNA/blood evidence supports McDowell's account of Hayward's movements. Moreover, McDowell heard three shots, two from a small caliber weapon followed by a

⁴ This Court will recall that Destefano was shot with a .22, but that the third shot was from a louder gun, Destefano's .357 magnum based on the fact there were two softer shots followed by a louder third shot. Hayward's hypothesis makes no provision for the two guns, especially where the murder weapon is found in Hayward's rooming house spattered with Destefano's blood and Hayward is reported to have sold Destefano's silver .357 shortly after the murder. (R.24 1461-63; R.27 1863-64).

larger caliber gun. Destefano was shot twice with a .22 gun and in turn shot at his attacker with a .357 magnum. Only those three shots were heard at the time Destefano was telling his attacker he had nothing more to give. The State presented evidence that the gun was working properly and would not discharge merely upon by being dropped. (R.24 1458-63 1516-30, 1569-70, 1576-77; R.25 1580-92, 1604-11, 1616-30, 1637-40, 1652-68, 1682, 1690-94, 1696-97 1745, 1750-51, 1772-75; R27 1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; R.28 2009-20).

Together, the evidence rebuts Hayward's claim that he shot himself by dropping the gun after another black male at that early morning hour shot Destefano in an attempted robbery. The felony murder case was properly turned over to the jury to decide, and there is substantial, competent evidence to uphold the court's ruling. Likewise, the evidence supports the robbery conviction as Destefano was forced to surrender his property. This Court should affirm.

Hayward also challenges his death sentence, claiming that the felony murder aggravator should not have been found. However, as analyzed above, the robbery was established. However, even if the robbery were not proven, the burglary conviction remains which, is further support for the pecuniary gain aggravator as Hayward searched Destefano's car after

shooting him and in hopes of finding something of value to take. As such, two aggravators, prior violent felony and pecuniary gain, remain and the sentence remains proportional.⁵ Pope v. State, 679 So.2d 710 (Fla. 1996) (holding sentence proportionate as pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of extreme mental/emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances).

⁵ The trial court had merged the felony murder and pecuniary gain aggravators. Were this Court to strike the felony murder aggravator, the pecuniary gain aggravator would remain valid and a basis for the capital sentence.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Hayward's conviction and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Gary Lee Caldwell, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 10th day of October, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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