IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR, III,

Appellant,

v. CASE NO. **SC10-2269**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **CLAY** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER **0271543**
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
Davidd@leoncountyfl.gov

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR, III,

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STATE OF FLORIDA,

Appellee.
_____/

ISSUE I:

THE COURT ERRED IN DENYING KACZMAR'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR THE FIRST DEGREE MURDER AND ATTEMPTED SEXUAL BATTERY ALLEGATIONS BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT THE DEFENDANT HAD ATTEMPTED TO SEXUALLY BATTER MARIA RUIZ, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State cites this Court's opinion in Gudinas v. State, 693 So. 2d 952, 962 (Fla. 1997) to refute Kaczmar's claim that he did not attempt to sexually batter Ms. Ruiz. (Appellee's Brief at p. 33-35)

> In *Gudinas*, this Court concluded that a trial court properly denied a motion for JOA where there was undisputed eyewitness testimony that the defendant followed [the victim] and then tried to forcibly enter her car on three separate occasions, including an attempt to smash her window while screaming, "I want to f____ you." Gudinas

> only ceased his attempt to gain entry to the car when [the victim] "laid on the horn," creating a loud noise. 693 So.2d at 962.

Williams v. State, 967 So. 2d 735, 755 (Fla. 2007)

Significantly, in that case, the encounter did not occur in the defendant's home but in the parking lot of a bar, the victim was a stranger to Gudinas, and he relentlessly tried three times to get at her, declaring to the end that he wanted to have sex with her.

What distinguishes this case from Gudinas was that Ms. Ruiz, who was not a stranger to the defendant, confronted him with a knife in a home they shared. Until then, what he had done amounted to little more than making passes at her, and knocking on a door and window of a bathroom. When she went to the kitchen, grabbed a knife, and then cut him when he knocked it out of her hand, there was, at that point, no evidence that he still hoped to get lucky with her. At that point he had abandoned the efforts to have sex with her, and enraged, he simply attacked her because she had threatened him, and had cut his thumb in the process.

Moreover, if there was an attempted sexual assault at what point did Kaczmar's preparation turn into perpetration. In Gudinas that determination is easy. There the defendant's actions clearing showed that if he could have gotten to the victim he would have raped her. Only when she blew the car's horn did he

stop. Gudinas never voluntarily abandoned any attempt to sexually batter his victim.

In this case, if the defendant wanted to have sex with Ruiz, he could have done it when he made passes at her hoping, as he said, to "get lucky." (16 R 788-89) Even the shoving matches show no clear intent to sexually batter her. That is, if he really wanted to forcefully have sex with her, he would have done it then, as Gudinas would have had he been able to get to his intended victim. Kaczmar did not, even though he had the opportunity, and their shoving each other for a while before she went to the bathroom and closed the door shows he had no intent to forcefully or without her consent have sex with her. He did not smash any door as Gudinas had done with the car window. Instead, he only knocked on it, and when nothing happened, for some bizarre reason he went outside and tapped on the bathroom window, apparently hoping that if could not get in by the door, Ruiz would let him in the window. Significantly, after the passes and his hopes of getting lucky, there is no other evidence that he wanted to have sex with her, particularly when she confronted him in the kitchen with the knife.. That is, in Guidinas, until the victim blew the car horn, the defendant had relentlessly pursued her with the sole intent to rape her. That did not happen here. So, whatever the evidence showed that Kaczmar wanted to have sex with Ruiz, there was none that

at the time he killed her that he still wanted to do so. Whatever his "preparation" was to have sex with her never progressed beyond.

The State, on pages 35-37 closes its argument on this issue by claiming that whatever error occurred was harmless, and it cites the United States Supreme Court decisions in Hedgpeth v. Pulido, 555 U.S. 57 (2008) and Skilling v. United States, ___U.S. ___, 130 S.Ct. 2896, 2934, 177 L. Ed. 2d 619 (2010) to support its contention that Yates v. United States, 354 U.S. 298, 312 (1957) is no longer good law on whether errors of the sort committed here are per se reversible. Those cases have no application to Kaczmar's case.

First, Hedgpeth arose in the context of the collateral review of an improper jury instruction on alternative theories of guilt that may have contributed to Pulido's conviction for felony murder. In this case, Kaczmar is not challenging the correctness of the felony murder instruction at all. Instead, he has argued that the State presented insufficient evidence he attempted to sexually batter Ms. Ruiz. Hedgpeth's analysis hinged on whether the reduced harmless error analysis appropriate for collateral review, Brecht v. Abrahamson 507 U.S. 619, 623 (1993), should apply in cases where there is an instructional error. That is not the problem here.

In this case, if this Court should engage in a harmless error analysis at all it should use the one announced in State v. DiGulio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." If the jury improperly convicted Kaczmar of attempted sexual battery, however, the error is so serious and fundamental to his right to a fair trial, that a harmless error analysis is inapplicable. That is, the error in this case is not one of an improper instruction, which can be rendered harmless, Neder v. United States, 527 U.S. 1 (1999), but of a verdict that could have been based on a non-existent crime. For that problem, Yates and this Court's opinion in Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003) remain good law.

ISSUE II:

THE COURT ERRED IN ALLOWING THE STATE TO CALL PRISCILLA KACZMAR, THE DEFENDANT'S WIFE, TO GIVE TESTIMONY AGAINST HER HUSBAND, A VIOLATION OF SECTION 90.504, FLORIDA STATUTES, AND THE FOURTEENTH AMENDMENT.

The State's primary argument on this issue is "the prosecutor relied on the crime exception to the [husband-wife] privilege." (Appellee's Brief at p. 48) It finds a "crime exception" to the privilege, not in the plain language of §90.504, Fla. Stat. (2008), but in cases outside Florida, and most notably in the federal

courts. (Appellee's Brief at p. 45-46, f.n.3). However correct it may be in what federal law may be on this issue is besides the point. This issue requires this Court to apply the clear language of Florida's spousal immunity statute, not a federal rule. The First District Court of Appeal in Jackson v. State, 603 So. 2d 671 (Fla. 1990) when faced with the issue presented here, was "loathe to add additional exceptions" to the marital privilege. Because there is no "co-conspirator" exception to §90.504 this Court should also be loathe to graft one onto it.

It should not do so even though, as the State points out, the federal courts have done so. Unless a decision comes from the United States Supreme Court, this Court has held that it is not bound by those of the federal courts. Witt v. Wainwright, 465 So. 2d 510, 512 (Fla. 1985). When that position is coupled with the rules of statutory construction that courts should give statutes their plain meaning, and any ambiguity should be resolved in favor of the defendant, §775.021(1), Fla. Stat. (2008), then clearly the lower court erred in accepting the prosecutor's claim that he could elicit Priscilla's conversations with her husband because they were co-conspirators (17 R 837; 10 R 1816-17).

The State concludes by arguing that whatever error the lower court committed was harmless. But, in making that argument, it seems to employ an "overwhelming evidence" standard of harmlessness (Appellee's Brief at pp. 48-

50). That is the wrong measure because this Court said in State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986) "The question is whether there is a reasonable possibility that the error affected the verdict."

The State supports its harmless error claim by arguing that the perpetrator's identity was never in question because of victim's blood found on Kaczmar's sock, the $2.00 worth of gas he bought on the morning of the homicide, and the fresh cut on his thumb. They may be "hard facts" (Appellee's Brief at p. 51), but they are also ambiguous, as for example, the defendant said he got the cut from a fishhook (16 R 795-96, 17 R 935), and no one ever said the blood could only have come from Ruiz when killed and not some other time. In Arant v. State, 256 So. 2d 515, 516-17 (Fla. 1st DCA 1972), the State charged Arant with possession of marijuana because his fingerprint had been found on a potato chip can containing a marijuana plant. The First DCA, however, rejected that as evidence of possession:

> The use of fingerprints proves only that appellant touched the can. Whether on the subject premises or elsewhere, it does not tell. It is only proof of the identity of the person who touched the can. It was in no way declaratory of his knowledge that the contents of the can were contraband and was in no way declaratory of that degree of control or dominion over the contraband which would show possession within the meaning of the statute.

In this case, the blood on Kaczmar's sock proved only that at some time, and in some place Ms. Ruiz's blood was put there. This "hard fact" does not establish

it was done so at the time of the murder.

Thus, these facts, as "hard" as they may be, need help, and they got it from Filancea's testimony that linked the defendant to the murder. Yet, as mentioned in the Initial Brief at page 29, he had obvious credibility problems, being a three time convicted felony, and one who stood to gain favor in his latest case with the prosecutor (16 R 779, 780; 17 R 815-16). Thus, allowing the jury to hear Priscilla Kaczmar's privileged testimony to support what Filancea had said, could have bolstered his credibility, and hence it had a reasonable effect on the jury's verdict. As such, the court's error in allowing the jury hear that privileged communication was not error beyond a reasonable doubt.

This Court should reverse the court's judgment and sentence and remand for a new trial.

ISSUE III:

THE COURT FUNDAMENTALLY ERRED WHEN IT FAILED TO GIVE A COMPLETE INSTRUCTION TO THE JURY ON "HEAT OF PASSION" AS A DEFENSE TO SECOND DEGREE MURDER, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State says that Kaczmar, at trial and on appeal, did not and does not present a proposed jury instruction on heat of passion (Appellee's Brief at pages 52, 60). This issue does not focus on the wording or adequacy of some proposed

guidance. Instead, the question the defendant raises concerns whether one (regardless of its wording) should have been given. That is the issue, not whether some instruction adequately reflects the law on heat of passion. Before this Court can get to the problem the State complains about, it has to rule on the correctness of the one the defendant complains about.

The State on page 61 of its brief says that the evidence does not support giving a heat of passion instruction. The measure of adequacy, however, is extremely low in this area of the law. That is, if there is "any evidence" supporting giving an instruction, the court should give it. Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985) Here, Ms. Ruiz threatened Kaczmar with a knife, he cut his thumb, and he became "really angry" (16 R 789-90) at her. Regardless of whether this was a "classic example of heat of passion" scenario(Appellee's Brief at pp 62-63), it was "any evidence" that he was provoked to kill her, and it was sufficient to justify a heat of passion instruction as a partial defense to the first degree murder allegation. Whether such provocation was sufficient or adequate for the jury to have found him guilty of only manslaughter was for it to determine, but they should have been given that choice. In this case they were not, and the failure to give a complete or accurate instruction on the heat of passion as a partial defense was fundamental error. Davis v. State, 804 So. 2d 400 (Fla. 4th DCA 2001).

ISSUE IV:

THE COURT ERRED IN LIMITING KACZMAR'S CLOSING ARGUMENT AND DEFENSE WHEN IT REFUSED TO LET HIM RELY ON THE LANGUAGE IN COURT OPINIONS TO EXPLAIN OR GIVE EXAMPLES OF WHAT WAS OR WAS NOT PREMEDITATION, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

In Issue III, the State faults Kaczmar for not formally asking for a special instruction on heat of passion as a partial defense to first degree murder. In this issue, it notes that in his closing argument the defendant tried to argue just that, but the court precluded him from doing so (Appellee's brief at p.67-68). If trial counsel was trying to do as the State says, then he certainly had brought the issue of the need for a special instruction to the court's attention sufficient to have preserved that issue for this Court's review. Cf., Hooper v. State, 476 So. 2d 1253, 1261-62 (Fla. 1985)(Overton, dissenting); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Afterall, the trial court is not an automaton who acts only when acted upon. He or she has judicial experience sufficient to recognize an issue when it is placed before him, albeit not in the usual manner. Davis v. State, 373 So. 2d 382 (Fla. 4th DCA 1979)(" Trial judges should be discouraged from robot-like approaches to the trial of criminal cases.")

On pages 66-67 of its brief, the State says that defense counsel cannot instruct the jury on the law, and it quotes from and cites Taylor v. State, 330 So. 2d 91, 93 (Fla 1st DCA 1976) to support that assertion. A complete quote of the sentence from Taylor it used qualifies its claim that counsel cannot instruct the jury on the law: "While it is not the prerogative of an attorney in his closing arguments to instruct the jury on the law, it is entirely appropriate for an attorney in closing argument to relate the applicable law to the facts of the case." Id. That quote from Taylor applies here. Kaczmar wanted to apply the law to the facts of his case by arguing, as an example, other cases where this issue had arisen, and an appellate court had held or not held those facts amounted or did not amount to the heat of passion. Would he have said, "The First District Court of Appeal in Clowers v. State, 31 So. 3d 962 (Fla. 1st DCA 2010) held a shooting was done in the heat of passion?" No. But he could have said that a heat of passion shooting arises, for example, when two people get into a heated argument over one taking a child away from the defendant, and he then shoots the victim.

Indeed, that Kaczmar wanted to use scenarios that arose in actual cases would have been better than for him to have made up a heat of passion scenario and then on his own said that a shooting or stabbing was done under such emotional turmoil.

Kaczmar again wants to emphasize that this Court has given him, and the State, wide latitude during closing argument in what they argue. Ford v. State, 802 So. 2d 1121 (Fla. 2001). This makes sense because life and human experience defy strict limits. Defense lawyers may legitimately see things differently than the prosecutor, or even the trial judge. Afterall, that is what the adversarial system encourages: just as coins and hands have two sides, jurors should be exposed to opposing views of the evidence and law. What Kaczmar sought to do was simply broaden or expose the jury to a different view of his case than what the State in its two closing arguments did. That was within the discretion this Court has given counsel. It was not "in contravention of the jury instruction." (Appellee's brief at p. 68) He was simply arguing that the State had failed to prove he had committed a first degree premeditated murder, which was his theory of the case. See, Lukehart v. State, 776 So. 2d 906, 927 (Fla. 2000)("The prosecution may properly argue that the defense has failed to establish a mitigating factor."); Jean v. State, 27 So. 3d 784 (Fla. 784).

The trial court, thus, unfairly limited the "wide latitude" this Court gives counsel in making their closing arguments. This Court should reverse the lower court's judgment and sentence and remand for a new trial.

ISSUE V:

THE COURT ERRED IN EXCLUDING CERTAIN EXCULPATORY STATEMENTS KACZMAR MADE, WHICH, UNDER THE RULE OF COMPLETENESS, THE COURT SHOULD HAVE ADMITTED, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Whoever said, "There is nothing new under the sun" has not read the State's answer to the argument Kaczmar raised in this issue. Where Kaczmar made a simple, routine argument invoking §90.108, Fla. Stats (2008), the State sees it much more differently. "Defense counsel invoking the rule of completeness is the functional equivalent of defense counsel engaging in cross-examination." (State's Brief at pp. 78-79) Moreover, to solve that problem, it posits that the defendant can invoke the rule of completeness, but in doing so, he must "also have his prior convictions admitted." It then continues that "Kaczmar really seeks a third option of having the entire recording played but without his prior convictions being admitted as the price." (State's Brief at p. 80).

The only price the State and Kaczmar paid for not invoking the rule of completeness was that of a fair trial. If having the jury hear all of what he told the undercover agent was the functional equivalent of cross-examination, why limit the rule of completeness to simply telling the jury of the defendant's other convictions.

If, under the State's unprecedented solution, the rule of completeness is nothing more than the functional equivalent of cross-examination of the defendant, why not let everything else that might come in on cross be admitted.

But this is bizarre. The focus of the rule of completeness is not on exposing all the defendant's warts. It is a matter of simple fairness. To give a complete telling of what the defendant said, both the good and the bad, simple fairness requires a complete playing of the recording of what he had said. Truncated versions that distort the meaning of what he said, and mislead the jury, do not further the purposes of a trial but exalt convictions by presenting only a selective and hence skewed version of the evidence showing the defendant guilty over a full airing of all relevant proof. Let the jury hear everything the defendant said to the undercover officer, and let this body of citizens determine what to accept and what to reject.

ISSUE VI:

THE COURT ERRED IN FINDING THAT KACZMAR COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION, A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

Murders that are cold, calculated, and premeditated enough to merit the CCP aggravator must be cold, calculated, and premeditated, not simply premeditated. Yet, that is what the State seems to argue here, or rather it argues only that the murder of Ms. Ruiz had the heightened premeditation this Court requires. It says nothing about the additional requirements that it also be cold and calculated.

Moreover, what it argues regarding the heightened premeditation claim falls short of convincing. First, it makes much of Turner v. State, 37 So. 3d 212, 225 (Fla. 2010) where it said "the defendant had ample opportunity to release the victim but instead, after substantial reflection, 'acted out the plan he had conceived during the extended period in which the events occurred.'" (Appellee's Brief at p. 85).

In this case, there is no evidence Kaczmar planned to kill Ms. Ruiz until she confronted him with a knife in the kitchen. Until then he only hoped to "get lucky." Once she showed her knife and he had knocked it out of her hand, cutting

himself in the process, then he got angry and attacked her. Moreover, until then he had not displayed his knife, and until she produced hers, and he had hit it, did he pull the pocket knife (which he used for fishing) out of his pants. While Turner may have modified Geralds v. State, 601 So. 2d 1157 (Fla. 1992), it still requires the defendant to have done a "substantial" amount of reflection in order for the heightened premeditation element of the CCP aggravator to apply. Here, there simply is no evidence Kaczmar had that elevated intent to kill for any length of time.

Now the State also says that if the defendant could have left the crime scene and not committed the murder but, instead, commits the murder, then the murder can be CCP. (Appellee's Brief at 85, citing this Court's opinion in Owen v. State, 862 So. 2d 687, 701 (Fla. 2003)) But, however true that may be in general, in this case it has no application because Kaczmar lived at the trailer where the homicide occurred. He had no obligation to leave his residence, and had not, as happened in Turner, broken into anyone's abode before killing the victim.

Thus, the murder in this case was neither cold, nor calculated, nor committed with the heightened premeditation required for the CCP aggravator to apply.

This Court should, therefore, reverse the trial court's sentence of death, and remand for a new sentencing hearing.

CONCLUSION

Appellant, Leo Louis Kaczmar, III, requests this Honorable Court to reverse the trial court's sentence of death, and remand for a new sentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic transmission and U.S. Mail to **CHARMAINE MILLSAPS**, Assistant Attorney General, Counsel for the State, The Capitol, Tallahassee, FL 32399-1050; and by U.S. Mail to **LEO LOUIS KACZMAR, III** #J20499, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of December 2011.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rules of Appellate Procedure 9.210(a)(2), this brief was typed in Times New Roman 14 point.

Respectfully submitted,

NANCY DANIELS
Public Defender
Second Judicial Circuit

_____

DAVID A. DAVIS
Assistant Public Defender
Florida Bar No. **0271543**
Counsel for Appellant
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
davidd@leoncountyfl.gov
(850) 606-8500