IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-842
LT CASE NO.: 2007-CF-000866

WILLIAM GREGORY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA
INITIAL BRIEF OF APPELLANT

RICHARD R. KURITZ, ESQUIRE
Florida Bar No: 0972540
200 East Forsyth Street
Jacksonville, Florida 32202
Telephone: (904) 355-1999
Facsimile: (904) 854-1999
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS…………..…….……………………..…..…………….ii, iii

TABLE OF AUTHORITIES AND STATUTES……………………..………...iv, v

PRELIMINARY STATEMENT……………………….....…...……………….....1

STATEMENT OF THE CASE AND OF THE FACTS…...……………………..1-8

SUMMARY OF THE ARGUMENT……………………………………........8 - 9

POINTS OF APPEAL…………………………..……..…………..…..……...9

ARGUMENT……………………….……………….....................................10-26

ISSUE I……………………....……………………….…………………......10-13

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY JUDGE.

ISSUE II………………..……………………….………………………13-14

THE TRIAL COURT ERRED BY DENYING APPELLANT'S THIRD MOTION IN LIMINE.

ISSUE III……..…………………………………………………………14-16

THE TRIAL COURT ERRED BY ADMITTING, OVER APPELLANT'S OBJECTION, TESTIMONY FROM TYRONE GRAVES.

ISSUE IV……………………….……………………………………...…16-19

THE TRIAL COURT ERRED BY ADMITTING, OVER APPELLANT'S OBJECTION, HEARSAY TESTIMONY FROM MICHAEL GREEN AND CORI ALDRICH.

ISSUE V.……………………………….……………….…………………19-24

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION IN LIMINE CONCERNING THE AGGRAVATING

FACTOR OF "COLD, CALCULATING AND PREMEDITATED" AND BY ALLOWING THAT FACTOR TO BE ADMITTED.

ISSUE VI……………………………………………………..……………24-26

THE TRIAL COURT ERRED BY FINDING THAT THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED" WAS PROVEN BEYOND A REASONABLE DOUBT.

CONCLUSION…………………………………………………………...………27

CERTIFICATE OF COMPLIANCE…………………………………..…..…...28

TABLE OF AUTHORITIES

CASES PAGE(s)

Besarba vs. State, 656 So. 1d 441 (Fla. 1995) 23
Buckner vs. State, 714 So. 2d 388 (Fla. 1998) 24
Campbell vs. State, 571 So. 2d 415 (Fla. 1990) 24
Caruthers vs. State, 465 So. 2d 496 (Fla. 1985) 24
Crump vs. State, 622 So. 2d 963 (Fla. 1993) 21
Davis vs. State, 90 So. 2d 629 (Fla. 1956) 25
Deparvine vs. State, 995 So.2d 351 (2008) 17
Forehand vs. State, 120 Fla. 464, 171 So. 241 (1936) 25
Geralds vs. State, 6091 So. 2d 1157 (Fla. 1992) 23
Gore vs. State, 599 So. 2d 978 (Fla. 1992) 23
Hamblen vs. State, 527 So. 2d 800 (Fla. 1988) 22
Hamilton vs. State, 547 So. 2d 630 (Fla. 1989) 24
Hardy vs. State, 716 So. 2d 765 (Fla. 1998) 21
Hoskins vs. State, 702 So. 2d 210 (Fla. 1997) 23
J.M. vs. State, 665 So. 2d 1135 (Fla. 5th DCA 1996) 18
Jackson vs. State, 648 So. 2d 85 (Fla. 1994) 20, 21
Larkins vs State, 739 So. 2d 90 (Fla. 1999) 20
Mahn vs. State, 714 So. 2d 398 (Fla. 1998) 23
Maxwell vs. State, 443 So. 2d 967 (Fla. 1984) 22
Moulden vs. State, 617 So. 2d 298 (Fla. 1993) 22
Pardo vs. State, 563 So. 2d 77 (Fla. 1990) 23
Penn vs. State, 574 So. 2d 1079 (Fla. 1991) 24
People vs. Carlos, 138 Cal. App. 4th 907; 41 Cal. Rptr. 3d 873 (2006) 15
Richardson vs. State, 604 So. 2d 1107 (Fla. 1992) 21, 22
Robertson vs. State, 780 So. 2d 106 (Fla. App. 3d Dist. 2001) 13
Rogers vs. State, 511 So. 2d 526 (Fla. 1987) 21, 22
Santos vs. State, 591 So. 2d 160 (Fla. 1991) 22
Sireci vs. State, 399 So. 2d 964, 967 (Fla. 1981) 25
State vs. DiGuilio, 491 So. 2d 1129 (1981) 18
Thompson vs. State, 456 So. 2d 444 (Fla. 1984) 22
Tien Wang vs. State, 426 So. 2d 1004 (Fla. App. 3 Dist. 1983) 25
Walker vs. State, 997 P. 2d 803 (Nev. 2000) 13, 14
Walls vs. State, 641 So. 2d at 387-388 24
White vs State, 446 So. 2d 1031 (Fla. 1984) 22
Williams vs. State, 967 So. 2d 735, 764 (Fla. 2007) 21
Zakrzewski vs. State, 717 So. 2d 492 (Fla. 1998) 23

Table of Statutes

Fla. Stat. 921.141(5)(i)……………………………………………………………20
Fla. Stat. 90.803(1)…………………………………………………………………..17
Florida Evidence Section 803.1 (2007 Ed.)…………………………………………17

PRELIMINARY STATEMENT

Appellant, William Gregory, will be referred to herein by name as "Appellant" or "Gregory". The Appellee, State of Florida, will be referred to herein as the "State" or "prosecution". References to the Record on Appeal will be designated by the symbol "R", the supplement to the record will be referred to as SR, with reference to relevant page set forth in brackets.

STATEMENT OF THE CASE AND FACTS

Appellant was arrested for First Degree Murder and Burglary of a Dwelling on August 21, 2007. This Appeal is from Appellant's second trial. On October 12, 2010, during the course of the first trial, the Honorable Kim C. Hammond granted a Motion for Mistrial. (R. III. p. 479). On March 3, 2011, the jury in the second trial returned a verdict of guilty of Murder in the First Degree as to Counts I and II, guilty of Burglary of a Dwelling with an Assault while in Possession of a Firearm as to Count III, and guilty of Possession of a Firearm by a Convicted Felon as to Count IV. (R. IV, pp. 604-607).

After Judge Hammond's Order Granting Motion for Mistrial was entered, the Chief Judge, due to Judge Hammond's pending retirement, entered an Order of Reassignment on October 18, 2010 appointing the Honorable William Parsons to try the instant case (R. III p. 481). On February 4, 2011, during a hearing conducted by Judge Parsons on Appellant's Motion in Limine #3, the Court

overruled the Appellant's objection to the introduction of a statement allegedly made to a Francis Bowling that "if [Appellant] ever caught [victim Skylar Meekins] with another man, he would kill her." Appellant argued that the statement, if made, was too remote to be relevant. The Court overruled Appellant's objection and stated that it found such statements to be "***prophetic***" (R. XXVI, p. 66) (emphasis added), demonstrating the Court had already publicly pre-judged Appellant to be guilty. The Court also made further comments demonstrating bias in favor of the State, and those comments were subsequently published in the Daytona Beach News-Journal, the prominent newspaper of the area. The Court commented after hearing a recording of the victim that to hear her voice was "refreshing", and that the Appellant had "silenced" that voice. (R. XXVI, p.86)

Due to the Court's comments, Appellant filed a legally sufficient Motion to Disqualify Judge (R. III, p. 538). The Court denied the motion without explanation (R. III, p. 536).

At trial, the State presented evidence that on the night of August 21, 2007 Appellant, entered the Meekins' residence without permission and killed both Skylar Meekins and Daniel Dyer after retrieving a shotgun that was kept in a hall closet and shooting both of them as they slept.

The state also presented evidence that the Appellant and Ms. Meekins had been involved in a relationship that produced a child. They had known each other for a number of years and, after the baby was born, moved in together and lived with Skylar's grandparents for approximately one (1) year until Appellant was asked to leave.

Shortly thereafter, Appellant was in jail on unrelated charges and the relationship began to deteriorate. Skylar Meekins no longer wanted a relationship with Appellant, and that was made clear to him in a number of recorded jail calls. The State presented evidence attempting to show Appellant to be suspicious, controlling and demanding when it came to Skylar Meekins.

The State presented evidence that Appellant became close friends with Skylar's brother Colton Meekins and would call him from the jail, wanting to know what Skylar was doing, where she was and who she was with. Appellant allegedly told Colton Meekins that Skylar had better not be screwing around on him. The state presented testimony that Appellant told Colton to check Skylar's email so he could see who she was talking to. Appellant allegedly told Colton to check her MySpace page, see what photos were on there, telling him to erase anything that had to do with any other males (R. XV, pp. 951-962).

After presenting these phone conversations, the state presented evidence to prove that Appellant was angry. The State called a former cell mate, Tyrone

Graves, to testify that Graves was present when these phone calls were made and that Appellant made incriminating statements to him after those phone conversations (R. XV, pp. 1105-1106).

While Appellant was still in jail in June 2007 on unrelated charges, the state presented evidence that the two victims met and started dating on July 4, 2007. Appellant had let it be known to Skylar that he was about to get out of jail and he wanted to do something with her, but she did not want to see him, and this upset him.

The State presented evidence that as soon as Appellant got out of jail, he learned about this new relationship between Skylar Meekins and Daniel Dyer. The state presented evidence that showed Appellant was jealous and angry, even stalking Skylar at one point and showing up unannounced and secretly watching her as she was swimming in a pool with friends (R. XVI, pp. 1147-1150).

The State called Francis Bowling to testify that six to eight months prior to the murders, Bowling worked with Appellant as both were roofers. During the course of their employment together, Bowling testified, they had conversations about what either would do if they caught their girlfriends cheating on them. According to Francis Bowling, Appellant said that he would kill them both (R. XIV, p. 918).

On August 20, 2007 the evidence showed that Appellant had made numerous phone calls to Skylar Meekins and phone calls to a cab company late in the evening. Shortly thereafter, Appellant entered Skylar Meekins' residence, found her and Daniel Dyer sleeping in bed together, and killed them both with a shotgun found inside the home.

On August 21, 2007 the Flagler County Sheriff's Office was contacted after Skylar Meekins' grandparents made the gruesome discovery of the bodies. Sheriff's Office evidence technicians took photographs and collected physical evidence. At the scene of the alleged crime, a semi-automatic shotgun was found lying on the floor inside the bedroom. This shotgun was owned by Skylar's father, Charles Meekins, and had been stored inside a closet in the residence (R. XVI, pp. 1194-1196). Skylar Meekins and Daniel Dyer were found lying on her bed, both deceased from shotgun blasts to the head.

The State presented evidence from family members of Skylar Meekins to confirm that Skylar had broken off the relationship with William Gregory just prior to Gregory's incarceration at the Flagler County Jail on June 6, 2007. The Meekins family members explained how the breakup upset the Appellant to the point that he would steal items, such as Skylar's driver's license, from the Meekins' residence and then call to see if he could bring the items back, in hopes of seeing Skylar again.

The family members further relayed that Appellant was known to frequently argue with Skylar Meekins at the residence and that she would frequently ask Appellant to leave. Investigators were further advised by the Meekins family that although the house was completely secured, Appellant would unlawfully enter the house via the bedroom window of Skylar Meekins, as well as utilizing the back door, the garage door, and the front door.

Appellant's brother, Edward Kory Gregory, testified that approximately one week prior to the homicides Appellant confided in his brother that he wanted to kill Skylar Meekins and himself so that they could be together (R. XVIII, pp. 1487-1489).

Michael Green, who was Daniel Dyer's best friend and roommate, testified that several days prior to the homicides, Appellant called Dyer's cell phone while Dyer and Green were working on a job. Dyer then related to Green that Appellant had told him, in so many words, "I want to personally thank you for messing up my family." (R. XXVI, pp. 1245-1246).

On the night of the homicides, calls from William Gregory's residence to the Meekins' home phone were made at 10:05 p.m., 10:07 p.m., 10:14 p.m., 10:20 p.m., 10:25 p.m., 10:26 p.m., and 10:27 p.m. At 10:31 p.m., a call was placed from Appellant's residence to A1 American Taxi Cab. A second call was placed to A1 at 11:32 p.m. Neither call was connected successfully. There were no other

calls placed from Appellant's residence for the next five (5) hours. There was evidence that Appellant did not have access to a vehicle.

There was testimony that gunshots were heard in the residence at approximately 1:08 a.m., consistent with the approximate time of death of the victims. William Gregory was seen by his grandmother Mary Lou Wilson returning to his residence at approximately 3:30 a.m. – 3:45 a.m. Members of the Flagler County Sheriff's office walked the distance between Appellant's residence and the Meekins residence and found that the walk took them one hour and twenty nine minutes, a timeline which comports with the time of death of the victims and the walking distance between the two residences from the last call to the cab company.

While processing the shotgun used in the homicide, three fingerprints were recovered by FDLE (R.XIV, pp. 848-849). A comparison of the latent prints and known fingerprints of Appellant were consistent. (R. XIX, p. 1747).

At the close of the evidence, the jury found William Gregory guilty. Appellant filed a Motion for New Trial, which was denied. The penalty phase was conducted on March 8–9, 2011. The jury returned a recommendation of a death sentence with a majority vote of 7 to 5 as to each count (R. IV, pp. 669-670). A *Spencer* hearing was held on April 1, 2011.

Appellant timely filed his Notice of Appeal, and this appeal follows. Any delay was due to the substitution of counsel and numerous attempts to acquire the complete Record prior to the undersigned accepting the appointment for representation.

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Appellant's Motion to Disqualify Judge / Motion for Recusal. The Motion was legally sufficient under Florida Rule of Judicial Administration 2.330, and should have resulted in the immediate and proper recusal of Judge William Parsons.

2. The trial court erred in denying Appellant's Motion in Limine by permitting testimony by Francis Bowling. The testimony that was too remote in time and unduly prejudicial to Appellant.

3. The trial court erred by admitting, over Appellant's objection, testimony from Tyrone Graves, a former inmate at the St. Johns County Jail, when the witness could not identify Appellant at trial. Graves testified that a person he knew as William Gregory made statements while in jail that if he ever caught his girlfriend with anyone else, he would kill them both. These statements were hearsay and unduly prejudicial to Appellant especially since Graves could not identify Appellant at trial.

4. The trial court erred by admitting, over Appellant's objection, a statement allegedly made by Appellant to victim Dan Dyer days prior to the homicides. Witnesses Michael Green and Cory Aldrich testified that Dyer had told them that Appellant said to Dyer something to the effect of "thanks for messing up my family." This is hearsay, irrelevant and unduly prejudicial to Appellant.

5. The trial court erred by denying Appellant's Motion in Limine regarding the admissibility in the penalty phase of the aggravating factor of "cold, calculated and premeditated" and by denying Appellant's Motion for Mistrial after the Court denied the Motion in Limine. No evidence was presented to corroborate or support this aggravating factor.

6. The trial court erred by finding that the aggravating factor of "cold, calculated and premeditated" was proven beyond a reasonable doubt. No evidence was presented to support this aggravating factor.

POINTS ON APPEAL

I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY JUDGE.

II. THE TRIAL COURT ERRED BY DENYING APPELLANT'S FIRST AND THIRD MOTIONS IN LIMINE.

III. THE TRIAL COURT ERRED BY ADMITTING, OVER APPELLANT'S OBJECTION, TESTIMONY FROM TYRONE GRAVES.

IV. THE TRIAL COURT ERRED BY ADMITTING, OVER APPELLANT'S OBJECTION, HEARSAY TESTIMONY FROM MICHAEL GREEN AND CORI ALDRICH.

V. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION IN LIMINE CONCERNING THE AGGRAVATING FACTOR OF "COLD, CALCULATING AND PREMEDITATED" AND BY ALLOWING THAT FACTOR TO BE ADMITTED.

VI. THE TRIAL COURT ERRED BY FINDING THAT THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED" WAS PROVEN BEYOND A REASONABLE DOUBT.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY JUDGE.

The trial court committed reversible error by denying Appellant's Motion to Disqualify Judge and Motion for Rehearing (R. III, pp. 538-544). During a hearing conducted by Judge William Parsons on February 4, 2011 on Appellant's Motion in Limine, the Court overruled Appellant's objection to the introduction of a statement allegedly made by Appellant to Francis Bowling that if (Appellant) ever caught (victim) Skylar Meekins with another man, he would kill her. Appellant objected to the statement and argued that if the statement had in fact been made, it was too remote in time to be relevant. The Court, however, overruled Appellant's objection and stated that it found such statements to be "***prophetic***" (R. XXVI, p. 66) (emphasis added). In doing so, the Court evidenced a bias against Appellant. The statement was a clear indication that he had pre-judged the Appellant guilty prior to trial and before hearing any evidence in the case.

The Court further commented that it found the introduction of certain phone calls that contained the voice of victim Skylar Meekins to be "**refreshing**" in that her voice, which "**had been silenced**," would now be allowed to be heard (R. XXVI, p. 86) (emphasis added). Such additional commentary in open court evidenced a judicial bias against Appellant and in favor of the victims and the State, and it certainly compounds Appellant's perception that he will not receive a

fair trial. Furthermore, the Court's comments were published in the Daytona Beach News-Journal, the main newspaper in the area for the potential jurors to read. The public perception should be clear that the trial court had prejudged Appellant's guilt.

On February 8, 2011 Appellant filed the Motion to Disqualify Judge and Motion for Rehearing. The Motion was in writing; it alleged specifically the facts and reasons upon which Appellant relied as grounds for disqualification; it was sworn to by Appellant; it separately certified that it was made in good faith; it specifically stated that Appellant feared he would not receive a fair and impartial trial due to named facts that would indicate a bias or prejudice; and it was timely filed (R. III, pp. 538-544).

Under Rule 2.330 Florida Rules of Judicial Administration (Disqualification of Trial Judges), Judge William Parsons committed reversible error by not immediately recusing himself once the Motion to Disqualify was timely filed. Rule 2.330 states the following:

> (c) <u>Motion</u>
> A motion to disqualify shall:
>
> 1. be in writing;
> 2. allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;
> 3. be sworn to by the party by signing the motion under oath or by separate affidavit; and
> 4. the attorney for the party shall separately certify that the motion and the client's statements are made in good faith.

> (d) Grounds
> A motion to disqualify shall show:
>
> 1. that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge.
>
> (e) Time
> A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting grounds for the Motion and shall be promptly presented to the court for an immediate ruling.
>
> (f) Determination
> The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge ***shall*** (emphasis added) immediately enter an order granting disqualification and proceed no further in the action.

Examination of the Motion to Disqualify filed by Appellant clearly shows it to be legally sufficient under Rule 2.330. Based on this, Judge Parsons was required under this Rule to grant the Motion and immediately disqualify himself. The language of the Rule is clear. It does not give the judge discretion to decide whether or not to recuse himself. If the Motion is legally sufficient – as it were in this case – then Judge Parsons ***shall*** immediately enter an order granting disqualification. He erred by denying the Motion and refusing to disqualify himself.

While each of the comments alone would be enough for a legally sufficient motion to recuse, the cumulative nature clearly demonstrate such.

II. THE TRIAL COURT ERRED BY DENYING APPELLANT'S THIRD MOTION IN LIMINE.

The trial court committed reversible error by denying Appellant's Motion in Limine #3. This Motion concerned the testimony of Francis Bowling, a witness who knew the Appellant from their time working together as roofers. The state presented testimony from witness Bowling regarding statements that Appellant allegedly made to Bowling approximately eight (8) months prior to the homicides. According to witness Bowling, Appellant allegedly stated that he would harm or kill Skylar Meekins or anyone else if she (Skylar) ever left Appellant.

Appellant filed a Motion in Limine, arguing that the alleged statement was too remote in time, irrelevant and prejudicial (R. III, pp. 418-419). The Court subsequently denied the Motion. At trial, witness Bowling testified to the alleged statement (R. XIV, p. 918).

One case on point is Walker v. State, 997 P. 2d 803 (Nev. 2000), cited approvingly by the Court in a Florida case, Robertson v. State, 780 So. 2d 106 (Fla. App 3d Dist 2001). In Walker, the Appellant had threatened to kill her husband twice - ten years prior and six years prior - before actually killing him and had pointed a gun at him both times. The Court held that the prior threatening acts and statements were not admissible as too remote in time and that the more remote

the acts were in time, the less relevant they became. The Court weighed the prejudice of introducing the prior threatening acts and statements against the relevance and held that the acts in question in that case established only a propensity to threaten, not to kill, and that they were very prejudicial to the Appellant in showing her to be a dangerous person. Hence, the prior acts and statements were excluded as more prejudicial than probative.

In the instant case, the time period between threats and the murder is shorter - eight months - but certainly no more proving of actual intent to kill than in Walker. In fact, the argument can be made that in this case it was indeed less so because Appellant never pointed any type of weapon at anyone and the prejudice in implying actual intent to kill outweighs any probative value.

III. THE TRIAL COURT ERRED BY ADMITTING, OVER APPELLANT'S OBJECTION, TESTIMONY FROM TYRONE GRAVES.

The Court erred in admitting testimony from Tyrone Graves concerning statements Appellant allegedly made to Graves. At trial, Graves testified that he and an inmate named "William" were in adjoining cells in the Flagler County jail who used to play checkers almost every day and talk all the time (R. XV, p. 1100). Over defense objection, witness Graves described "William" as very angry and very jealous over a young lady who wouldn't speak with him and who refused to answer his phone calls (R. XV, pp. 1104-1105). Witness Graves further testified over defense objection, that Appellant allegedly stated that "if I ever catch the

bitch cheating" that he (Appellant) was going to "blow her fucking head off" (R. XV, p. 1106).

Aside from the contemporaneous objections to the testimony as hearsay and irrelevant, the defense also objected, prior to the testimony of witness Graves, on the grounds that the witness did not and could not identify Appellant as the person who made those statements.

> Q: When – well, do you see Billy – the person you know as Billy in the courtroom today?
>
> A: I'm looking around and, no, I don't see him, actually.
>
> Q: You don't see him?
>
> A: No.

At that point, defense counsel objected to any further testimony by Graves and the objection was overruled (R. XV, pp. 1100-1101).

It does not appear that Florida has dealt with this issue to date, but California has. In People v. Carlos, 138 Cal. App. 4th 907, 41 Cal. Rptr. 3d 873 (2006), one of the witnesses called by the prosecution failed to make an in-court identification and the evidence was excluded. There had been a pre-trial photo identification, which was found to be unduly suggestive, and that plus the failure of the witness to be able to identify the Appellant in court led to an exclusion of her identification testimony.

In the instant case, Tyrone Graves could not identify Appellant in court; therefore, his testimony should have been excluded, and allowing his testimony was prejudicial to Appellant and constituted reversible error.

IV. THE TRIAL COURT ERRED BY ADMITTING, OVER APPELLANT'S OBJECTION, DOUBLE HEARSAY TESTIMONY FROM MICHAEL GREEN AND CORI ALDRICH.

The State called Cori Aldrich and Michael Green to testify. Aldrich testified that she was friends with both Michael Green and Daniel Dyer but was not friends with Appellant. Over defense objection, Aldrich testified to a conversation she had with Daniel Dyer. She testified that Daniel Dyer told her that he had a phone conversation with Appellant in which Appellant had allegedly said to Daniel Dyer "I want to personally thank you for ruining my life" (R. XVI, p. 1151).

Green testified that he had known Daniel Dyer for a long time and was a very close friend of his. Green was, at that point, residing with Dyer and his family in Palm Coast (R. XVI, pp. 1239-1240). He testified he did not know the Appellant.

Green testified to conversations he had with Daniel Dyer concerning his relationship with Skylar Meekins. Green knew Skylar and had previously met her. At one point, Green stated there was a time that Daniel Dyer relayed a conversation he had with Appellant. Over defense objection as to hearsay and double hearsay, the Court allowed the testimony to continue. Green testified that

Daniel Dyer told him that Appellant had called him (Dyer) and said "I personally want to thank you for ruining my family." According to Green, this conversation took place approximately one (1) week prior to the homicides (R. XVI, pp. 1245-1246).

This issue involves clear error by the Court. The testimony by Cori Aldrich and Michael Green as to Dyer's statements are clearly hearsay, as they involve testimony as to out of court phone statements by Daniel Dyer to prove the truth of the matter asserted - that the Appellant made threatening/ incriminating statements about the victim.

In this instance, none of the exceptions to the hearsay rule apply. The statements were clearly not dying declarations, nor were they excited utterances. The statement would also not be considered a spontaneous statement (Fla. Statutes 90.803 (1)) which defines "a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness."

Appellant finds guidance in Deparvine v. State, 995 So. 2d 351 (2008) addressed the meaning of a spontaneous statement, approving the comments of Charles W. Erhardt, Florida Evidence Section 803.1 (2007 Ed), stating that "If more than a "slight lapse of time" has occurred between the event and the

statement, the spontaneity is lacking." In the instant case, a number of days had passed; therefore, this is clearly more than a slight lapse of time and the testimony should not have been allowed.

Further, the statements must be made without the declarant "first engaging in reflective thought." Departine quoting the Court in J.M. v. State, 665 So. 2d 1135 (Fla. 5th DCA 1996). In this case, there is no showing that the statements were made spontaneously, i.e. at the same time that the threats were made or in a "slight lapse of time thereafter, or without reflective thought. From the facts stated, there is no showing of any "spontaneity" in the statements. They involve statements Dyer made sometime in the past.

In addition, the testimony was prejudicial and by no means harmless error. For the State to justify a conviction despite errors at trial, the State "must establish beyond a reasonable doubt that the error did not contribute to the jury's verdict." Departine citing the Court in State v. DiGuilio, 491 So. 2d 1129 (1981). "If a reviewing court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." State v. DeGuilio at 1139.

In the instant case, the testimony bears on the Appellant's state of mind and whether the murders were premeditated. Testimony as to explicit or implicit threats on the life of the victim, or showing great animosity toward the victim, is

certainly highly instrumental in establishing premeditation. In allowing both Green and Aldrich to testify, the trial court committed reversible error.

V. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION IN LIMINE CONCERNING THE AGGRAVATING FACTOR OF "COLD, CALCULATING AND PREMEDITATED" AND BY ALLOWING THAT FACTOR TO BE ADMITTED.

In the instant case, the State failed to present any evidence to support this aggravating factor. Therefore, the three (3) main elements were never proven beyond any reasonable doubt. The State presented witnesses Francis Bowling and Tyrone Graves, both of whom testified to statements allegedly made by Appellant to the effect of if (Appellant) ever caught his girlfriend cheating on him, he would kill her and the guy she was with. The alleged statement to Bowling was made eight (8) months prior to the homicides and Bowling said he did not take Appellant seriously. The statement to Graves was made approximately two (2) months prior. Even in the light most favorable to the State, this fails to equate to a cold, calculated plan on part of the Appellant.

The State presented evidence that Skylar Meekins and Daniel Dyer started dating July 4, 2007, and the relationship was known to Appellant. No testimony was presented of any plan to kill Daniel Dyer or to harm him in any manner during the time leading up to the homicides.

The State elicited from Michael Green a statement from Daniel Dyer in which Appellant allegedly told Dyer "thanks for ruining my family." This

statement was allegedly made days prior to the homicides and, at best, shows Appellant to be sad or jealous or upset about losing his family. It certainly does not indicate a cold, calculated plan to kill anyone.

The State presented testimony and evidence that Appellant left his house and went to the Meekins residence on the night of the homicides. After entering the residence, he saw Skylar Meekins and Daniel Dyer both asleep in her bed. After discovering the two in bed together, he flew into a jealous rage, grabbed a shotgun from a closet and shot both of them within seconds of each other. The evidence presented by the State is completely devoid of any showing of a cool, calm and reflective planning of the crimes that would support the aggravating factor of cold, calculated and premeditated (CCP) aggravating circumstance.

Aggravating Circumstance: Cold, Calculated and Premeditated

Fla. Stat. 921.141(5)(i) Florida Statutes reads:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Florida Supreme Court has opined that this is one of the most serious of the aggravating circumstances. Larkins v. State, 739 So.2d 90 (Fla. 1999). In the 1994 case of Jackson v. State, 648 So.2d 85 (Fla. 1994), the Supreme Court delineated four (4) specific elements which must be proven beyond a reasonable doubt before the factor is established:

1. That the "killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage;"

2. That the murder be a product of a "careful plan or prearranged design to commit murder before the fatal incident;"

3. "Heightened premeditation," which was described as premeditation over and above what is required for first degree murder; and

4. The murder must have "no pretense of moral or legal justification."

Jackson at 89.

1. Product of Cool and Calm Reflection

The state of mind of the perpetrator is critical to an analysis of the evidence for the aggravating circumstance to be proven. As noted in Jackson, an essential element is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." A killing in a fit of rage is inconsistent with the CCP factor. Williams v. State, 967 So.2d 735, 764 (Fla. 2007); Crump v. State, 622 So.2d 963 (Fla. 1993); Richardson v. State, 604 So. 2d 1107 (Fla. 1992). In addition, impulse or panic killings during a felony do not qualify as CCP. Hardy v. State, 716 So.2d 765 (Fla. 1998). In Hardy, the Appellant and his companions were stopped by a police officer who searches them for weapons. Appellant had a stolen pistol and shot the officer in a spur of the moment panic. In Rogers v. State, 511 So.2d 526 (Fla. 1987), the Appellant shot a

robbery victim because he was "playing hero." See also Hamblen v. State, 527 So.2d 800 (Fla. 1988) (Appellant shot robbery victim in the head after becoming angry with her for activating the silent alarm); Thompson v. State, 456 So.2d 444 (Fla. 1984)(Appellant shot gas station attendant after being told there was no money on the premises); Maxwell v. State, 443 So.2d 967 (Fla. 1984) (Appellant shot robbery victim when he verbally protested handing over his gold ring); White v. State, 446 So.2d 1031 (Fla. 1984) (Appellant shot two people and attempted to shoot others during a robbery).

Killings in the heat of passion, or emotional frenzy do not qualify for the CCP factor. Moulden v. State, 617 So.2d 298 (Fla. 1993); Santos v. State, 591 So.2d. 160 (Fla. 1991); Richardson v. State, 604 So.2d 1107 (Fla. 1992).

The facts of the instant case simply do not qualify for the CCP factor. Appellant flew into a jealous rage when he saw Skylar Meekins and Daniel Dyer in bed together. There was no cool and calm reflection. No weapon was even taken to the home.

2. Product of a Careful Plan or Prearranged Design to Murder

To support the CCP factor, the evidence must prove beyond a reasonable doubt that the murder was calculated – committed pursuant to "…a careful plan or prearranged design to kill…" Rogers v. State, supra. The Court in Rogers noted that "this aggravating factor is reserved primarily for execution or

contract murders or witness elimination killings" or other carefully planned homicides. Zakrzewski v. State, 717 So.2d 492 (Fla. 1998); Pardo v. State, 563 So.2d 77 (Fla. 1990).

A plan to kill cannot be inferred from a lack of evidence, and a mere suspicion is insufficient. Hoskins v. State, 702 So.2d 210 (Fla. 1997); Besaraba v. State, 656 So.2d 441 (Fla. 1995); Gore v. State, 599 So.2d 978 (Fla. 1992).

Additionally, if the evidence can be interpreted to support the CCP factor, as well as a reasonable hypothesis other than a planned killing, then the CCP factor has not been proven. Mahn v. State, 714 So.2d 398 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992). This was a case in which the Court ruled that a plan to commit burglary does not necessarily mean a plan to commit murder and alternative theories as to how the murder occurred negate the CCP aggravating factor.

In the instant case, the murders were certainly not part of a careful plan or prearranged design. There was no evidence of a contract killing; witnesses were not eliminated according to any design or plan; and this was certainly not a carefully planned homicide and Appellant did not even take a weapon to the scene. No evidence exists to support this requirement.

3. Heightened Premeditation Required

Simply proving a premeditated murder for purposes of guilt is not enough to support the CCP aggravating circumstance. The Supreme Court has required greater deliberation and reflection. Walls v. State, 641 So.2d at 387-388. Court decisions are somewhat vague as to how much greater premeditation is required, but discussion of the element typically notes the existence of the "calculated" and "coldness" elements as demonstrating the greater premeditation. Walls, supra; Buckner v. State, 714 So.2d 388 (Fla. 1998).

Even a manner of death which requires a period of time to accomplish its end does not necessarily provide the perpetrator with the needed time for calm reflection. Campbell v. State, 571 So.2d 415 (Fla. 1990). Multiple gunshot wounds also do not prove the CCP factor. Hamilton v. State, 547 So.2d 630 (Fla. 1989); Penn v. State, 574 So.2d 1079 (Fla. 1991); Caruthers v. State, 465 So.2d 496 (Fla. 1985).

In the instant case, no evidence was presented or exists to prove the heightened premeditation requirement. There was no evidence that Appellant deliberated or reflected on his actions.

VI. THE TRIAL COURT ERRED BY FINDING THAT THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED" WAS PROVEN BEYOND A REASONABLE DOUBT.

On April 14, 2011 the trial court sentenced Appellant to death after following the 7-5 advisory verdict of the jury (R. V, p. 37). During the

sentencing, the trial court determined, without a factual basis or factual justification, that the elements of the CCP aggravating factor had been met and that the CCP factor had been proven (R. V, p. 27).

In Tien Wang v. State, 426 So. 2d 1004 (Fla. App. 3 Dist. 1983) the Court reversed a first degree murder conviction and cited Sireci v. State 399 So. 2d 964, 967 (Fla 1981):

> Premeditation is a fully-formed conscious purpose to kill, which Exists in the mind of the perpetrator for and in pursuance of which an act of killing ensues…It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

The Court in Tien further cited Davis v. State, 90 So. 2d 629 (Fla. 1956):

> When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consisted with the Appellant's guilt, but it must also be inconsistent with any reasonable hypothesis of innocence…

The Court in Tien then quoted the court in Forehand v. State, 120 Fla. 464, 171 So. 241 (1936):

> As the element of premeditation is an essential ingredient of the crime of murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused was guilty of murder in the first degree, as defined by our statute. Forehand at 243.

The Court concluded that the evidence in that case was as consistent with Appellant acting in the heat of passion as it was with him having committed premeditated murder, and therefore the evidence was not sufficient to exclude a reasonable doubt as to the premeditated design. Therefore, the first degree murder conviction was reversed.

The facts in the instant case support this point on appeal. Appellant did not bring a weapon to the Meekins residence when he either walked to the home or was driven there in a cab. He did not have a firearm with him. He had never threatened any person with any weapon at any time in the past. According to the facts presented by the State, it was only after Appellant saw Skylar Meekins and Dan Dyer sleeping in bed together did he retrieve a shotgun from the Meekins residence. Based on the foregoing case law, the court erred concerning this issue.

CONCLUSION

For all of the foregoing reasons, the convictions and sentences in this case should be reversed. For the Florida death penalty process to have any integrity, this Court should not allow a citizen of this State to be subject to execution based on the issues raised in this case. Gregory respectfully requests this Court remand for a new trial.

Respectfully submitted,

____

Richard R. Kuritz, Esquire
Florida Bar No: 0972540
200 East Forsyth Street
Jacksonville, Florida 32202
Telephone: 904-355-1999
Facsimile: 904-854-1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, via U.S. Mail and E-mail transmission to Ms. Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, and via U.S. mail to the Appellant, Mr. William A. Gregory, DC# V19522, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026 on this 9th day of January, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is typed in Times New Roman font, and it is in size 14 font.

____

Richard R. Kuritz, Esquire
Florida Bar No: 0972540
200 East Forsyth Street
Jacksonville, Florida 32202
Telephone: 904-355-1999
Facsimile: 904-854-1999