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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2009-2010

CR-05-0225

Tierra Capri Gobble

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-05-299)

On Return to Remand

MAIN, Judge.

The appellant, Tierra Capri Gobble, was convicted of intentionally murdering her 4-month-old son, Phoenix Parrish, an offense defined as capital by § 13A-5-40(a)(15), Ala. Code

1975, because Phoenix was under the age of 14. The circuit court sentenced Gobble to death. This Court affirmed her conviction and remanded the case to the circuit court for it to correct its sentencing order to make specific findings of facts concerning each aggravating circumstance set out in § 13A-5-49, Ala. Code 1975, and to make specific findings of fact concerning the application of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel when compared to other capital murders. See Gobble v. State, [Ms. CR-05-0225, February 5, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010). This case is now before this Court on return to remand.

Gobble argues that the circuit court failed to fully comply with our instructions because, she asserts, the court failed to make specific findings of fact concerning nine of the aggravating circumstances enumerated in § 13A-5-49, Ala. Code 1975. In our original opinion, we noted that it would be harmless error for a circuit court not to make specific findings of facts on all the statutory aggravating circumstances when that defect was the only defect in the sentencing order. Because it was necessary to remand this

case for another reason, we also directed the court to make specific findings of fact concerning all 10 of the statutory aggravating circumstances. For the following reasons and in the interest of judicial economy, it is unnecessary to remand this case a second time. As we explained in Fortenberry v. State, 545 So. 2d 129 (Ala. Crim. App. 1988):

> "[T]his Court has, on several occasions, remanded cases with instructions for the trial court to correct the sentencing order to include specific findings of fact regarding those aggravating circumstances in § 13A-5-49, Ala. Code 1975, that it had found not to exist. However, in those cases, there were additional defects in the sentencing order that required a remand other than the failure to include specific findings regarding the aggravating circumstances that did not exist. See, e.g., Ziegler v. State, 886 So. 2d 127 (Ala. Crim. App. 2003)(remanding case because the trial court failed to make specific findings of fact regarding the mitigating circumstances that it had found not to exist as well as the aggravating circumstances it had found not to exist); Turner v. State, 924 So. 2d 737(Ala. Crim. App. 2002)(remanding case because the trial court's findings regarding certain mitigating circumstances were erroneous as well as because the court had failed to make specific findings of fact regarding those aggravating circumstances it had found not to exist); Key v. State, 891 So. 2d 353 (Ala. Crim. App. 2002)(remanding case because the trial court failed to make specific findings of fact regarding the mitigating circumstances that it had found not to exist as well as the aggravating circumstance it had found not to exist); McNabb v. State, 887 So. 2d 929 (Ala. Crim. App. 2001)(same); and Clark v. State, 896 So. 2d 584(Ala. Crim. App. 2000)(remanding case for the trial court to enter

> specific written findings summarizing the crime and the defendant's participation in it, regarding the existence or nonexistence of each mitigating circumstance in § 13A-5-51, Ala. Code 1975, as well as regarding the nonexistence of aggravating circumstances)."

545 So. 2d at 144.

In applying the a harmless-error analysis to a circuit court's failure to make specific findings of facts concerning each aggravating circumstances enumerated in § 13A-5-49, Ala. Code 1975, we further noted in Fortenberry:

> "While the trial court's sentencing order is defective, the errors are not so egregious or substantial as to require a new sentencing order. 'The sole purpose of requiring that the trial judge, as the sentencing authority, make a written finding of the aggravating circumstance is to provide for appellate review of the sentence of death.' Ex parte Kyzer, 399 So. 2d 330, 338 (Ala. 1981). '[T]he harmless error rule does apply in capital cases at the sentence hearing.' Ex parte Whisenhant, 482 So. 2d 1241, 1244 (Ala. 1983). 'As long as the trial judge properly exercises his discretion and the facts indicating the death penalty are 'so clear and convincing that virtually no reasonable person could differ,' a harmless error analysis can be used.' Baldwin v. State, 456 So. 2d 117, 126 (Ala. Cr. App. 1983), affirmed, Ex parte Baldwin, 456 So. 2d 129, 140 (Ala. 1984). See also Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Thompson v. State, 503 So. 2d 871, 881 (Ala. Cr. App. 1986), affirmed, Ex parte Thompson, 503 So. 2d 887 (Ala.), cert. denied, Thompson v. Alabama, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987). We emphasize that 'the safer practice would have been for the trial judge to simply follow the verbiage of

> the statute in negating aggravating circumstances.' Berard v. State, 402 So. 2d 1044, 1051 (Ala. Cr. App. 1980)."

545 So. 2d at 144. See also Saunders v. State, 10 So. 3d 53 (Ala. Crim. App. 2007); Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003); Stewart v. State, 730 So. 2d 1203 (Ala. Crim. App. 1996).

In this case, the circuit court stated the following in its sentencing order: "No other aggravating circumstance as enumerated by statute was found to exist." (C.R. 275.) Thus, the circuit court's "technical omission" in failing to make specific findings of fact on all of the statutory aggravating circumstances is harmless and does not warrant a second remand by this Court.

Gobble next asserts that the aggravating circumstance that the murder was especially heinous, atrocious, or cruel when compared to other capital murders was erroneously applied in this case.

On remand, the circuit court stated the following findings concerning this aggravating circumstance:

> "[T]he offense was committed upon a small child (four months old) by striking his head against a hard surface causing trauma [and] internal injuries. The victim's fourth, fifth, and sixth ribs were

> fractured. Bleeding was observed between the scalp and skin as well as between the skull and brain. This act by a mother shocks the conscience of this Court. This was a callous and calculated act and, in this Court's opinion, was especially cruel, heinous and atrocious as compared to other capital offenses. This was a brutal beating that caused tremendous pain and suffering upon this small child, who was helpless and unable to defend himself. The mother-Defendant, Tierra Gobble.. was not supposed to be around the child because the State of Florida had given custody of the child to Mr. Parrish, a roommate of the defendant, due to her abuse and neglect. Apparently, the pattern of abuse and neglect continued until she ended the life of this small child. Her last fateful act on the small child only showed her total disregard of any feelings for her own child and demonstrates very clearly why the jury's unanimous verdict of especially heinous, atrocious and cruel as compared to other capital offenses was correct and supported by the evidence.
>
> "This Court has weighed this aggravating circumstance along with the mitigating circumstances that were found to exist, and finds that the aggravating circumstance as described above outweighs the mitigating circumstances, and the appropriate sentence for this crime is death."

(C.R. 123-24.)

In reviewing the application of this aggravating circumstance, we have stated:

> "The Alabama appellate courts' interpretation of 'especially heinous, atrocious, or cruel' has passed muster under the Eighth Amendment because those courts have consistently defined the term to include only 'those conscienceless or pitiless homicides which are unnecessarily torturous to the victim.' Ex parte Clark, [728 So. 2d 1126 (Ala. 1998)], citing,

> Lindsey v. Thigpen, 875 F. 2d 1509 (11th Cir. 1989)."

Taylor v. State, 808 So. 2d 1148 (Ala. Crim. App. 2000). "In this determination we must consider whether the violence involved in achieving the killing went beyond what was necessary to cause death, whether the victims experienced appreciable suffering after a swift assault, and whether there was psychological torture." Brownfield v. State, [Ms. CR-04-0743, April 27, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007).

> "We have consistently held that brutal beatings that result in death meet the statutory definition of especially heinous, atrocious, or cruel. See Brooks v. State, 695 So. 2d 176 (Ala. Crim. App. 1996), aff'd, 695 So. 2d 184 (1997); Smith v. State, 795 So. 2d 788 (Ala. Crim. App. 2000); Ashley v. State, 651 So. 2d 1096 (Ala. Crim. App. 1994); McGahee v. State, 632 So. 2d 976 (Ala. Crim. App.), aff'd, 632 So. 2d 981 (Ala. 1993); Freeman v. State, 555 So. 2d 196 (Ala. Crim. App. 1988). Other states have also found that brutal beatings that result in death are especially heinous. See State v. Gerlaugh, 135 Ariz. 89, 659 P.2d 642 (1983) (brutal beating lasting 15 minutes was sufficient to satisfy aggravating circumstance that the murder was committed in an especially heinous, cruel, or depraved manner); Scott v. State, 494 So. 2d 1134, 1137 (Fla. 1986) ('The brutal senseless beatings which the victim was forced to endure further set this crime apart from the norm of capital felonies and clearly reflect the conscienceless, pitiless and unnecessarily torturous nature of this crime.'); State v. Sepulvado, 672 So. 2d 158 (La. 1996)."

Blackmon v. State, 7 So. 3d 397, 421 (Ala. Crim. App. 2005). A victim's age and physical condition are relevant when assessing this aggravating circumstance. See Brown v. State, 982 So. 2d 565, 607 (Ala. Crim. App. 2006).

Dr. Jonas Salne testified that each of the numerous injuries inflicted on Phoenix would have caused him great pain. Phoenix had blunt-force injuries to his head, several fractured ribs, a fracture to his right arm, fractures to both wrists, multiple bruises on his face, head, neck, and chest, and a tear in the inside of his mouth that was consistent with having a bottle shoved into his mouth. The broken ribs, he said, would have caused Phoenix tremendous pain every time he breathed, which for a baby, he said, was 20 or 30 times a minute. Dr. Salne further testified that a child of Phoenix's age would be unable to help himself. He also said that some of Phoenix's injuries were in various stages of healing. The cause of death, Dr. Salne testified, was a subdural hematoma which, he described, "is a medical term for a blood clot that forms between the inside of the skull and the brain tissue. And then this causes sufficient pressure which then disrupts the entire brain system, which ultimately will lead to death,

if not treated." (R. 460.) The injuries, he testified, did not occur from one specific act but were from more than one act. There was evidence indicating that Phoenix's injuries occurred during the middle of the night and Gobble testified that Phoenix was alive at around 9:00 a.m. when she checked on him. There was evidence indicating that the victim suffered for an appreciable period before his untimely death. "The cruelty exercised upon [Phoenix] is clearly demonstrated by the nature and extent of his physical injuries. These injuries caused [Phoenix] intense and severe pain before he died. The physical abuse and neglect were significantly more ruthless than that required to commit murder." Ward v. State, 814 So. 2d 899, 924 (Ala. Crim. App. 2000). The circuit court correctly found that Phoenix's murder was especially heinous, atrocious, or cruel when compared to other capital murders.

In accordance with § 13A-5-53, Ala. Code 1975, we must address the propriety of Gobble's conviction and sentence of death. Gobble was convicted of murdering her four-month-old son, Phoenix, an offense defined as capital by § 13A-5-40(a)(15), Ala. Code 1975.

The record reflects that Gobble's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

The circuit court found that the aggravating circumstance outweighed the mitigating circumstances. The court found as the sole aggravating circumstance that the murder was especially heinous, atrocious, or cruel as compared to other capital murders. See § 13A-5-49(8), Ala. Code 1975. The circuit court found as statutory mitigating circumstances that Gobble had no significant history of prior criminal activity, § 13A-5-51(1); that the murder was committed while Gobble was under the influence of extreme mental or emotional disturbance § 13A-5-51(2); and that Gobble acted under extreme duress or under the substantial domination of another person, § 13A-5-51(5). The circuit court found the following nonstatutory mitigating circumstances:

> "(1) Ms. Gobble suffers from Attention Deficit Hyperactivity Disorder; and, further, Ms. Gobble was diagnosed and treated by two different psychiatrists in Lakeland, Florida, and was prescribed Ritalin and Adderall to treat her hyperactivity;
>
> "(2) Ms. Gobble [was born and]...tested positive for marijuana and methamphetamine;

"(3) Ms. Gobble was raised in an abusive environment and, in fact, both Tierra Gobble's mother, Lori Gobble, and her stepfather at that time, Dallas Gobble, admit that the two of them 'fought like cats and dogs....,'

"(4) Domestic violence occurring between Ms. Gobble's mother and stepfather during the time they were married (approximately eight years) was so severe that the Navy ordered Dallas Gobble, the step-father, to attend marriage counseling as a condition of Dallas Gobble's being able to remain in the Navy;

"(5) During the time when Tierra was ten years old, Tierra's mother, Lori Gobble, abandoned Tierra and Tierra's brother, Dallas, Jr., to go live with a boyfriend;

"(6) During Tierra's childhood, after her younger brother, Dallas, Jr., was born, Tierra was frequently saddled with the sole responsibility of caring for her younger brother because her mother was not in the household or her mother placed the responsibility of caring for Dallas Jr. on Tierra;

"(7) On an occasion during Tierra's childhood, she was stabbed in the hand with a fork by her mother, Lori Gobble, because Lori Gobble believed Tierra was reaching for too many pieces of bread;

"(8) Tierra's grandparents, Beth and Bordie Gobble, upon checking on Tierra and her younger brother Dallas Jr., found animal and human feces throughout the house and discovered that the toilet was not working because it was stopped up; and Tierra was alone with Dallas Jr. trying to be the parent. This occurred when Tierra was approximately eleven years old; and, further at this time in the house, Tierra was discovered to have bruises on her and the house was infested with roaches;

"(9) During Tierra's childhood, when she was about eleven or twelve, Tierra's mother, Lori, would bring men home with her and have sex with the men in the house;

"(10) Tierra Gobble, from age twelve until her high school graduation at age nineteen, received no contact or communication from her mother, and after that, her mother had no contact with her until Tierra was arrested for capital murder;

"(11) Ms. Gobble was born into and grew up in a neglectful, abusive and dangerous environment;

"(12) From the time she was eight months old until she was ten years old, Ms. Gobble witnessed severe and pervasive violence by her parents. She was never offered any protection from the recurring domestic violence;

"(13) Ms. Gobble experienced emotional and financial neglect and abuse. During this period of time, the children had very little to eat, stayed in a violent environment and were not able to establish an enduring pattern of protection and security;

"(14) Ms. Gobble was a victim of physical abuse primarily from her mother throughout most of her childhood. There was emotional abuse as well in this environment;

"(15) As a result of the above four factors, Ms. Gobble internalized the violence and neglect she witnessed and experienced creating an internal emotional environment of depression that she was unable to cope with. In addition to depression she very likely experienced anxiety and severe emotional trauma that she tried to repress;'

"(16) Ms. Gobble's unresolved childhood issues apparently exacerbated into post-partem depression. She did not learn appropriate coping skills as a

> child so she internalized her worry and anger causing depression symptoms;
>
> "(17) There does not appear to be any pre-meditation in the commission of the offense but rather an impulsive, thoughtless response to stress while she was in the throes of a post-partem depression. This response was the culmination of a lifetime of mistreatment and trauma that Tierra experienced;
>
> "(18) Ms. Gobble suffered as a child and continues to suffer today as an adult from Attention [Deficit] Hyperactivity Disorder."

(C.R. 277-79.) On remand, the circuit court reweighed the aggravating circumstance against the mitigating circumstances and found that the aggravating circumstance outweighed the mitigating circumstance and sentenced Gobble to death.

Gobble argues that the circuit court erred in finding that one aggravating circumstance outweighed "over twenty mitigating circumstances."

Section 13A-5-48, Ala. Code 1975, provides:

> "The process described in Sections 13A-5-46(e)(2), 13A-5-46(e)(3) and Section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the

> relevant circumstances in an individual case is life imprisonment without parole or death."

"The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation." Ex parte Clisby, 456 So. 2d 105, 108-09 (Ala. 1984). "[W]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party." Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990). Clearly, the circuit court gave the mitigating circumstances little weight in light of the brutal and heinous aggravating circumstance that was present in this case. "The weight to be attached to the aggravating and the mitigating evidence is strictly within the discretion of the sentencing authority." Smith v. State, 908 So. 2d 273, 298 (Ala. Crim. App. 2000). We agree with the circuit court's findings.

Section 13A-5-53(b)(2), Ala. Code 1975, provides that this Court must independently weigh the aggravating circumstance against the mitigating circumstances. After independently weighing these circumstances, we are convinced

that death was the appropriate sentence for Gobble's horrific actions that ultimately led to the untimely death of her four-month-old son.

Neither is Gobble's sentence disproportionate nor excessive to sentences imposed in other capital convictions for similar murders, § 13A-5-53(b)(3), Ala. Code 1975. See Johnson v. State, [Ms. CR-06-0858, December 18, 2009] ___ So. 3d ___ (Ala. Crim. App. 2009) (death sentence imposed for murder of six-month-old son); Blackmon v. State, 7 So. 3d 397 (Ala. Crim. App. 2005) (death sentence imposed for murder of two-year-old daughter); Broadnax v. State, 825 So. 2d 134 (Ala. Crim. App. 2000) (death sentence imposed for murder of four-year-old child).

Last, we have searched the record for any error that may have adversely affected Gobble's substantial rights and have found none. See Rule 45A, Ala.R.App.P.

Accordingly, Gobble's sentence of death is due to be, and is hereby, affirmed.

AFFIRMED.

Wise, P.J., and Welch, Windom, and Kellum, JJ., concur.