IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Appellant,

v. CASE NO. 78,701

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case and Facts with the following additions:

Archer told Bonifay to murder the man who was working at Trout Auto Parts Friday night and to take the money from the store so it did not look like a hit (R 126). Archer told Bonifay to go to the window and ask for a Nissan clutch and other parts which would require the man to go into the back room, then Bonifay could go in to the store, unlock the door to let his companion in, and shoot the man when he came back (R 127). Archer also informed Bonifay about a security camera, which door would be open, which door to run out so no one would see them, and where the money was (R 128-33, 150).

Archer also obtained a gun from Kelly Bland which he then gave to Bonifay (R 128, 156). Bonifay's first encounter with the Trout clerk was Friday night when Bonifay went to the window, asked for a part, the man turned around and said he didn't have the part, and Bonifay left (R 129)[1]. The next day Archer threatened to hurt Bonifay's girlfriend and mother if he did not complete the murder (R 130). In the meantime, Eddie Fordham had shot the gun, so Bonifay, Cliff Barth and Fordham had to go buy some more bullets on Saturday (R 130-31). Barth, Fordham and Bonifay went to Trout Auto Parts Saturday night at which time Bonifay approached the window, the clerk saw his face and Bonifay

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[1] Wells testified he stayed behind the metal door because he was "spooked" about Bonifay and coming in late wearing gloves when it was not cold (R 179-180).

shot the clerk (R 131)[2]. Bonifay jumped up in the window and Barth pushed him through (R 132). The victim was talking about his kids (R 132)[3]. The day after the murder, Archer was laughing and refused to give Bonifay the money because he killed the wrong man (R 135). Bonifay did not know who the clerk was Friday night and didn't remember whether it was the same man Saturday night (R 152). He didn't know it wasn't the same man (R 153).

The closing procedure at Trout Auto Parts was that three stores would close early and take their deposits to the fourth store, the one robbed by Bonifay (R 170-71). Only one man operated the store after 10:00 (R 173).

Bonifay told Investigator O'Neal about the money in the briefcase the night he was arrested (R 144). O'Neal testified Bonifay told him Archer was going to pay him to do the job (R 251).

Archer had previously threatened Wells (R 188). One time he showed Wells a gun and said "this is how I take care of problems" (R 184).

Contrary to the Appellant's assertion, Bonifay's testimony was not "seriously challenged" but was corroborated by other witnesses. Bonifay told George Wynn before the murder what he intended to do and Wynn tried to talk him out of it (R 193). Wynn also testified Bonifay told him Archer had said there would

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[2] Either Barth or Bonifay reached through and shot the clerk a second time.

[3] Barth's testimony at the penalty phase shows the victim was begging for his life when Bonifay shot him the last 2 times in the head (R 455).

be one person in the store, the doors would be locked and to go through the window (R 193).

Cliff Barth testified that Bonifay called and asked him to help in the robbery. Bonifay told Barth he knew where the money boxes were and that other stores left their money there on the weekend because Archer told him this information (R 202-03). When they got in the car to go to the robbery, Bonifay said he had to find Archer to get the gun. They drove to Archer's residence, Archer and Bonifay got inside a truck and Bonifay came back with a gun (R 204). Archer told Bonifay there were cameras so they took ski masks (R 204). Barth also testified about the details of the murder (R 206-07).

Daniel Webber testified that Sunday night when the murder was on the news, Archer said "I think I know who did it", and proceeded to tell Webber he told the assailant how to do it (R 214). Archer said it would take two people and would require a ski mask. One person would order parts then when the guy went to get them the other would help him through the box. When the guy returned they would shoot him in the back of the head (R 214). Webber contacted the Sheriff's Department (R 215).

The medical examiner testified there were four gunshot wounds: two to the head which passed through the brain, one on the back side of the chest and one to the front of the chest (R 231).

The security tape from Trout Auto Parts showed it was four minutes from the time the person was seen coming through the window until the time they left (R 250).

Archer testified he went to the Trout store to drop off cash receipts with Ed Bird around 10:15 or 10:30 Saturday night and Wayne Coker was the night clerk (R 281-82). Archer got along good with Coker and liked him (R 283). He then went back to his house which he left to pick up his girlfriend (R 285). They passed cop cars and ambulances at the Trout store but did not stop (R 285). Archer said Bonifay was mad at him because he would not take Bonifay to buy drugs since his car tag was expired (R 291). That night Archer had driven his girlfriend to work, picked her up later, drove her to her house, drove back to the Trout store in which Ed Bird worked, drove back to his girlfriend's house, drove home, drove back to his girlfriend's house, then drove home again (R 279-285, 317-320).

Rodney Archer, a defense witness, testified Wells thought Archer had the impression Wells had something to do with Archer being fired (R 346). Rick Archer, another defense witness, testified that Webber told him Archer told him he'd instructed Bonifay how to get into Trout Auto (R 356).

At the penalty phase Cliff Barth testified:

> Q. Did someone ever get up on the counter?
> A. Yes, Patrick did.
>
> Q. Was anyone saying anything during this time?
> A. Yes, Patrick was.
>
> Q. What was he saying?
> A. He was telling the man, Mr. Coker, to shut the fuck up and fuck your kids and that.
>
> Q. What was Mr. Coker saying?
> A. He was telling Patrick not to shoot him no more because he had kids and a wife. And he said he wouldn't say nothing to the police.

Q. Did he say anything else about his children?
A. Yeah, he said he had a boy and a girl and he gave their ages.

Q. And what did Patrick say to that?
A. He said fuck your kids.

Q. And shot him in the head?
A. Uh-huh.

(R 455).

SUMMARY OF ARGUMENT

Issue 1: The specific arguments regarding the judgment of acquittal were not raised at the trial level and are waived. There is no merit to these arguments. There was sufficient evidence to convict Archer of both premeditated and felany murder. Archer planned to k ll Wells and under the doctrine of transferred intent he is guilty of killing Coker. He planned the robbery and is guilty of the resulting homicide.

Issue 2: The murder was heinous, atrocious and cruel, The victim was shot twice in the chest. Four minutes elapsed before he was shot twice in the head. During this time he begged for his life and was aware of his impending death.

Issue 3: There was no objection to the jury being instructed on the aggravating circumstance of cold, calculated and premeditated and this issue is waived. Even though Archer planned to kill Wells and Coker was killed, under the doctrine of transferred intent, this aggravating circumstance can be applied to the murder of Coker.

Issue 4: This issue has absolutely no merit. The trial court followed the guidelines established by this court in explaining his reasons for rejecting mitigating circumstances.

ARGUMENT

ISSUE 1

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AND THE ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW.

Archer claims that since he contracted with Bonifay to kill Wells but Bonifay killed Coker and the robbery was ancillary to the murder of Coker, he cannot be convicted of either premeditated or felony murder and the trial court erred in denying his motion for judgment of acquittal.

The theory of defense at trial was that Archer did not offer Bonifay money to kill Wells, knew nothing about the robbery, attempted murder or murder, and was framed because he would not take Bonifay to buy drugs. The arguments advanced on appeal were not raised at the trial level and this issue is not preserved for appellate review. See, Tillman v. State, 471 So.2d 32 (Fla. 1985); Castor v. State, 365 So.2d 701 (Fla. 1978).

In moving for judgment of acquittal, defense counsel argued:

> MR. LANG: Judge, I make a motion for directed verdict of acquittal. There's not been sufficient evidence to justify the charges made by the indictment. There's inadequate evidence been presented to the Court for the Court to make a finding of guilt based on the evidence that's been presented.

(R 260).

The motion was renewed after the state informed the court there was no rebuttal but no further grounds were advanced (R 363).

Even if this issue could be entertained on appeal, Archer is not entitled to relief. When moving for a judgment of acquittal the defendant admits all facts adduced in evidence and every conclusion favorable to the state. Ramos v. State, 505 So.2d 418, 420 (Fla. 1987); Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975). Courts should not grant a motion for judgment of acquittal unless the evidence is such that no view the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); see also, State v. Law, 559 So.2d 187, 189 (Fla. 1989). Factual conflicts are to be resolved by the jury, and there was substantial competent evidence to support the jury's verdict of guilt as to both premeditated and felony murder. See, Gore v. State, 17 F.L.W. S247, 249 (Fla. April 16, 1992); Maquiera v. State, 588 So.2d 221, 224 (Fla. 1991).

Premeditated Murder

Archer admits he was not willing to pay Bonifay to kill whoever happened to be the night clerk at Trout Auto Parts; instead "he was to kill a specific, named person: Daniel Wells" (Initial Brief at 11). Archer claims, however, that Bonifay knew he was killing the wrong person so this is an independent act for which Archer cannot be held accountable. The record shows that Bonifay did not know Wells and did not know Coker was not the man he was supposed to kill. Bonifay did not know who the clerk was on Friday night and didn't know it wasn't the same man Saturday night (R 152-53). Bonifay had been in the auto part store once or twice a long time ago (R 128). He had been in the W Street

store maybe once in the last five years (R 142). Although Archer claims Bonifay must have seen Wells' face and noticed his build, the record shows the Friday incident was extremely brief, Wells was behind a window at night, and stepped quickly behind the metal door after Bonifay entered (R 179-80).

Archer intended to kill Wells and set Bonifay in motion. Under the doctrine of transferred intent, the original malice can be transferred to the person who suffered the consequence of the act. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). A principal is responsible for all acts of his co-defendant. Fla. Stat. 777.011; Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); Hernandez v. State, 323 So.2d 318, 320 (Fla. 3rd DCA 1975). Archer is guilty of premeditated murder. C.f., Antone v. State, 382 So.2d 1205 (Fla. 1980).

Furthermore, Archer was at the store one and one-half hours before the murder, knew Coker was the Saturday night clerk and that Bonifay was on his way to kill him thinking he was Wells. If he did not intend that Coker be killed, he could have warned Coker or stopped Bonifay.

Felony Murder.

Archer told Bonifay to rob the store so it would not look like a "hit" and told him how to rob the store (R 126-29). He argues that the "robbery, instead of being a cover-up for an assassination, became the primary motivation for killing the victim" (Initial Brief at 14). Therefore, since his intent was to kill Wells, not Coker, the underlying purpose of the robbery was defeated and he cannot be guilty of felony murder. It is

irrelevant whether the robbery was the secondary or primary purpose. Intent to murder is not an element of robbery. Archer planned the robbery and set Bonifay about his business. The jury convicted Archer of robbery. Archer does not attack the robbery conviction. He is guilty of felony murder. See, Parker v. State, 458 So.2d 750, 753 (Fla. 1984); State v. Dene, 533 So.2d 265 (Fla. 1988); C.f., VanPoyck v. State, 564 So.2d 1066 (Fla. 1990).

ISSUE 2

THE TRIAL COURT DID NOT ERR IN INSTRUCTING ON, AND FINDING, THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL. ERROR, IF ANY, WAS HARMLESS.

Archer claims the trial court erred in instructing the jury on heinous, atrocious and cruel and in finding this aggravating circumstance.

The aggravating circumstance of heinous, atrocious and cruel was established beyond a reasonable doubt. The victim was shot once from outside the window, once when Barth or Bonifay reached through the window, and twice as they were leaving the store. Approximately four minutes elapsed from the time the perpetrators went through the window and they left the store. During this time the victim lay on the floor with two bullets in his chest begging for his life.

This case is strikingly similar to Gaskin v. State, 591 So.2d 917 (Fla. 1991). In Gaskin this court found heinous, atrocious and cruel was established where the victim was shot twice after which the defendant entered through a window and shot her in the head at point blank range. The only difference is that Mr. Coker was begging for his life and calling out his children's names and ages when he was shot.

The simple fact that a victim is shot does not erase the mental anguish and terror experienced before the shooting. Coker was painfully aware of what was happening as he lay on the floor, heard Barth and Bonifay enter the store, and begged them to let him live. In Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983),

this court cited six cases to illustrate that even if death is instantaneous, as by a gunshot wound, when victims are subjected to agony over the prospect that death is soon to occur, the murder is heinous, atrocious and cruel. In Huff v. State, 495 So.2d 145 (Fla. 1986), the defendant shot his mother and father from the back seat of a car. The murder was heinous because the evidence showed the father turned in his seat and placed his hands up in a defensive position, and the mother witnessed her husband being shot while knowing she was about to be killed. See also, Douglas v. State, 575 So.2d 165 (Fla. 1991) (victim hit in head with rifle and shot); King v. State, 436 So.2d 50 (Fla. 1983) (victim struck in forehead with blunt instrument then shot in head; Melendez v. State, 498 So.2d 1258 (Fla. 1986) (victim shot in head and shoulders and throat slit); Zeigler v. State, 402 So.2d 465 (Fla. 1981) (victim shot then struck in head with blunt instrument).

This court has repeatedly recognized mental anguish as supporting a finding of heinousness. Garcia v. State, 492 So.2d 360 (Fla. 1986); Francois v. State, 407 So.2d 885 (Fla. 1981); Adams v. State, 412 So.2d 850 (Fla. 1982); Knight v. State, 338 So.2d 201 (Fla. 1976). Mental anguish alone has been held sufficient to support a finding of heinousness. Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986), citing Preston v. State, 444 So.2d 939 (Fla. 1984), and Routly, supra. Archer's argument that the murder is not heinous because he did not intend for him to suffer, has no merit. Hitchcock v. State, 578 So.2d 685 (Fla. 1990).

This court has never placed a time limit to qualify a murder as heinous. In Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988), the victim took several minutes to lose consciousness and was aware of her death. Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), involved a situation where elderly people were accosted in their home, became aware of their impending deaths, tried to run away, and were shot, In Johnson v. State, 497 So.2d 863, 871 (Fla. 1986), it took the helpless victim 3-5 minutes to die during which time she was in terror and experienced considerable pain. In Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986), this court rejected the argument that the murder was not heinous because death was instantaneous, observing that the appellant overlooked the events preceding the murder.

The question seems to be whether this court's reasoning in Omelus v. State, 584 So.2d 563 (Fla. 1991) precludes the application of heinous, atrocious and cruel to Archer. In Omelus the defendant contracted with a seasoned killer to murder the victim with a gun. The assailant used a knife instead, against the intent of the defendant. In the present case Archer placed a gun in the hands of a 17-year old who bumbled the first attempt, had to be pushed through the window, fumbled the padlocks, and proceeded to tell his friends about his adventures. Even the trial judge observed in his findings the murder was done in an "amateurish" fashion (R 545). Archer exhibited reckless disregard for the life of the victim and was indifferent to his suffering.

The focus should not be on whether the murderer intends the murder to be heinous, atrocious and cruel, it should be on whether the actual manner of death was heinous, atrocious and cruel. See, Mason v. State, 438 So.2d 374 (1983); Hitchcock v. State, 578 So.2d 685 (Fla. 1990). If the reasoning in Omelus is extended to every contract situation, a clever defendant can avoid the death penalty by hiring someone else, who may not otherwise be predisposed to murder but for the defendant, to insulate him from the consequences. The contractor is as responsible, if not more so, as the actual shooter since he sets the plan in motion.

The reasoning in Omelus cuts against the United States Supreme Court holding in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 137, 95 L.Ed.2d 127 (1987) in which the Court upheld a finding of heinousness even though defendants did not specifically intend the victims die or actually pull the trigger. Id. at 143. The court stated that a narrow focus on the question of whether or not a defendant intended to kill was a highly unsatisfactory means of distinguishing the most culpable and dangerous of murderers. Id. at 157. In fact, "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill"'. Id. at 157. Therefore, under Tison a defendant who was a major participant in the felony committed, combined with reckless indifference to human life could receive the death penalty. Id. at 158. Once the state proves heinous, atrocious and cruel, it should be applied to a co-defendant who is a major participant and shows

reckless indifference to human life. The state proved heinous, atrocious and cruel beyond a reasonable doubt and that Archer had a reckless disregard for the victim's suffering. "Reck1ess indifference'' should be the standard for applying this aggravating circumstance in a contract situation, not whether the defendant intended the murder to be heinous, atrocious and cruel. C.f., Diaz v. State, 513 So.2d 1045 (Fla. 1987); VanPoyck v. **State**, 564 So.2d 1066 (Fla. 1990).

The trial court found:

> Nothing could be more heinous, atrocious, and cruel than the termination of an already severely wounded husband and father as he pled for his life. Nothing could be more torturous than to beg for mercy in the names of one's wife and children and ta die with the killer cursing their existence. Defendant, although not present at the killing, intended it to happen just as it did--the conscienceless and pitiless taking of a human life, the clerk he had targeted.

(R 544).

The trial court's findings are supported by competent substantial evidence and should not be reversed.

Even if the heinous, atrocious aggravating circumstance were stricken, it would not change the outcome. The trial court weighed and considered the aggravating and mitigating circumstances. There were three valid aggravating circumstances. **The** only statutory mitigating circumstance was "no significant history", the weight of which was diminished by Archer's admitted drug use. The only nonstatutory mitigating circumstance was that Archer was a good son and family member. This could hardly be considered substantially mitigating under the circumstances. See

Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991). Archer would have received the death penalty even if the heinous, atrocious and cruel aggravating circumstance were stricken. See, Maharaj v. State, 17 F.L.W. S201 (Fla. March 26, 1992); Robinson v. State, 574 So.2d 108 (Fla. 1991); Porter v. State, 564 So.2d 1060 (Fla. 1990); Rivera v. State, 545 So.2d 864 (Fla. 1989); Hamblen v. State, 527 So.2d (Fla. 1988). See also, Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 108 L.Ed. 725 (1990). C.f., Happ v. State, 17 F.L.W. S68 (Fla. January 23, 1992); Young v. State, 579 So.2d 721 (Fla. 1991); Gore v. State, 17 F.L.W. S247, 249 (Fla. April 16, 1992); Reed v. State, 560 So.2d 203 (Fla. 1990); Rivera v. State, 561 So.2d 536 (Fla. 1990); Hardwick v. State, 521 So.2d 1071 (Fla, 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987).

ISSUE 3

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER WAS COLD, CALCULATED AND PREMEDITATED; THIS ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW.

Archer claims he only premeditated the murder of Wells, not Coker, so the aggravating circumstance of cold, calculated and premeditated cannot be applied. He concedes that "of course had Wells been killed, this aggravating factor would have applied to Archer" (Initial Brief at 23). This issue was never raised at the trial level and is not preserved for appellate review. See, Tillman v. State, 471 So.2d 32 (Fla. 1985); Castor v. State, 365 So.2d 701 (Fla. 1978). Defense counsel did not object to the jury being instructed on the cold, calculated and premeditated aggravating circumstances (R 447, 482).

This same argument was raised in Provenzano v. State, 497 So.2d 1177 (Fla. 1986) and this court held:

> Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim. Rather, as the statute indicates, if the murder was committed in a *manner* that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable. (Emphasis supplied.)

Id. at 1183.

Furthermore, Archer was at the store one and one-half hours before the murder, knew Coker was the Saturday night clerk and that Bonifay was on his way to kill him thinking he was Wells. If he did not intend that Coker be killed, he could have warned Coker or stopped Bonifay.

The trial court properly found **this aggravating circumstance applied.**

ISSUE 4

THE TRIAL COURT DID NOT CONVERT STATUTORY MITIGATING FACTORS INTO NONENUMERATED AGGRAVATION.

Archer claims that the trial judge converted two statutory mitigating factors into nonstatutory aggravators. He cites the trial court's discussion rejecting the statutory mitigating circumstance of extreme emotional disturbance[4] and relatively minor participation[5].

In Campbell v. State, 571 So.2d 415 (Fla. 1990) established guidelines for considering mitigating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. *See Rogers v. State,* 511 So.2d 526 (Fla. 1987), *cert. denied,* 484 *U.S.* 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Id. at 419. The trial court "expressly evaluated" this mitigating circumstance on which evidence was presented and when there was no evidence presented, he so stated (R 543-548). There is nothing in the trial court's order to support Archer's arguments the trial court converted the mitigating circumstance into nonstatutory aggravating circumstance. The trial judge specifically enumerated the three aggravating circumstances, discussed all the statutory mitigating circumstances and addressed non-statutory mitigation. The trial judge followed

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[4] Fla. Stat. 921.141(b).

[5] Fla. Stat. 921.141(d).

this Court's directions in Campbell, supra, and Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) and there was no error.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to David Davis, Assistant Public Defender, Lean County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301 this 7th day of May, 1992.

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