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

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Appellant,

v. **CASE NO. 78,701**

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE **COURT ERRED IN DENYING ARCHER'S MOTION FOR A JUDGMENT OF ACQUITTAL** BECAUSE **THE MURDER** OF **COKER WAS AN ACT INDEPENDENT OF THE AGREED UPON PLAN TO KILL WELLS.**

The **state** makes several points that merit reply. The first deals with **the** preservation of this issue for appeal, **and** it predictably claims that Archer failed to sufficiently alert the trial court of the issue **he** has presented to this court for review. Conceding for the moment that this argument was not fully preserved for this court's review, however, does not mean that it has thereby escaped all appellate scrutiny.

Regardless of what happened at the trial court level, this court has an obligation imposed by statute and rule to review **the** convictions and sentences of all persons sentenced to death "to ascertain whether they are proper." LeDuc v. **State**, 365 **So.2d 149, 150 (Fla. 1978).** Section **921.141(4) Fla.** Stat. **(1989).** Rule **9.140(f) Fla. R.** App. P. This obligation applies

even if the defense never challenged the legal sufficiency of the defendant's conviction. Id. In this case, Archer merely asks this court to review the sufficiency of the state's case against him under the theory that Bonifay's murder and robbery of Coker were independent of any agreement that the defendant and the triggerman had. This court can consider this issue.

Without developing any argument on transferred intent, the state an page 9 of its brief merely repeats black letter law that "Under the doctrine of transferred intent, the original malice can be transferred to the person who suffered the consequence of the act." While Archer has no problem with that simple statement of the law, this issue focuses upon independent acts rather than transferred intent. In Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this court provided the standard definition of transferred intent:

> The usual case involving the doctrine of transferred intent is when a defendant aims and shoots at A intending to kill him but instead misses and kills B. As a matter of law, this original malice is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act.

Id. at 1180.

That legal doctrine differs from independent acts in that in the former the defendant personally commits the criminal act whereas in the latter he does not and may in fact not be present when it occurs. Also, with transferred intent, the unintended victim is killed, but in independent acts the victim is the focus of the criminal act.

In this case, Bonifay never shot at Wells intending to kill him but hitting Coker instead. The evidence showed that Bonifay had seen Wells on Friday but did not kill him then. When he returned to the store on Saturday, he killed Coker, knowing that it was not the man Archer wanted killed and whom the defendant had contracted with Bonifay to murder. There was no transferred intent because Archer did not kill anyone and was not present when the murder occurred. Coker or anyone else that was on duty Saturday night was Bonifay's intended victim, and what he did was foreign to any deal he had made with Archer to kill Wells,

The state on page 9 of its brief also said that if Archer "did not intend Coker be killed, he could have warned Coker or stopped Bonifay." At trial Archer said he knew nothing of the murder before Bonifay committed it, so how could he have done anything to prevent what he was ignorant of?

Finally on pages 9-10, the state said it was irrelevant if the robbery was the "secondary or primary purpose" of the murder. The state seems to believe that anytime a murder occurs during the course of a robbery, the felony-murder doctrine applies. As this court explained in Bryant v. State, 412 So.2d 347, 350 (Fla. 1982):

> Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first-degree murder, . . ., there must be some causal connection between the homicide and the felony. (Cite omitted.)

Thus, in a convenience store robbery, the felony murder doctrine would not apply if the defendant shot a pedestrian who happened to walk by as the robbery occurred. In Bryant, the jury could have found that the victim was killed during a sexual battery (which Bryant had nothing to do with) rather than the earlier robbery, and it would then have been justified in acquitting him. The felony-murder doctrine would not have applied to the robbery because there was no causal connection between the robbery and the subsequent death.

In this case, the robbery was unrelated to the murder Archer had in mind. It was, instead, Bonifay's action, independent of the agreement Archer had made with Bonifay. Hence, the defendant cannot be held liable for Coker's death under a felony murder theory.

ISSUE II

THE **COURT ERRED IN INSTRUCTING** THE JURY **AND** IN **FINDING THAT** ARCHER **COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL MANNER.**

The state starts its attack on Archer's argument on this issue by claiming that this court's approval of especially heinous, atrocious, and cruel in Gaskin v. State, 591 So.2d 917 (Fla. 1991) indicates a similar holding should apply in this case because the cases are "strikingly similar." Hardly. In Gaskin, the defendant, with a loaded shotgun, approached the victim's house at night. After circling it several times, he shot Mr. Sturmfels twice through **a** window. His wife rose to leave, and Gaskin shot her once and Mr. Sturmfels a third time. **As** the wife crawled away, the defendant went to a door and shot her again. He then entered the house and shot each victim one more time. Afterwards he ransacked the house. Gaskin then went to another house and tried the same thing on another couple. They, however, escaped.

The trial court found that the especially heinous, atrocious, and cruel aggravating factor applied to the killing of the wife but not the husband.

In approving **the trial** court's finding of this aggravator as to the wife, this court noted that she realized what was going on after the defendant had twice shot her husband. When **she** tried to run, Gaskin shot her, and **as** she then tried to crawl, he shot her a second time, The defendant tracked her around the house and found her sitting and holding her head

looking at the blood. Gaskin shot her a third time and apparently left her "groggily or dying." Finally the defendant entered the house, and shot her a fourth time.

> The facts show that Mrs. Sturmfels knew her husband was being murdered, and that she must have contemplated her own death. She was shot at least twice before crawling down the hall where she watched blood pour from her wounds. She must have been in physical pain and mentally aware of her impending death as Gaskin first disabled her and then stalked her throughout the house.

Id. at 920-21.

This case differs from Gaskin in that Bonifay never stalked his victim, and he was not in his house at the time of the killing. Killing a person while they are at home tends to make simple killings especially heinous, atrocious, and cruel. *See*, Mason v. State, 438 So.2d 374 (Fla. 1983). Coker never contemplated his death as long, nor suffered as much as Mrs. Sturmfels, nor did Bonifay show such cold determination to kill his victim as Gaskin did, One is simply left numb after reading of Gaskins' cold indifference to Mrs. Sturmfels' suffering and his extra cruelty in searching her out and then killing her with a shotgun.

While what Bonifay did in this case was heinous, atrocious, and cruel, it lacked that extra, perhaps undefinable, quality which was so evident in the Sturmfels murder but which is absent in this case. It was not especially heinous, atrocious, and cruel.

The state cites several cases to support its argument that an instantaneous killing does not make a murder per se not

heinous, atrocious, and cruel. Examining the totality of the circumstances of the cases relied upon, however, shows that they are readily distinguishable from this case. Unlike this case, in Routly v. State, 440 So.2d 1257 (Fla. 1983) (and the six cases mentioned in that opinion) the victim here was not bound, gagged, and driven to a remote location, all the while anticipating his death. Also, unlike the cases cited on page 12 of the state's brief, Coker was only shot. Bonifay did not beat or bludgeon him or cut his throat, facts which elevate a simple shooting into one that is especially heinous, atrocious, and cruel.

While this court may not have required a victim to have suffered for a certain length of time, it has also recognized that quick killings do not elevate a murder into one that is death worthy. If he or she has suffered for an appreciable time before dying, the murder can become especially heinous, atrocious, and cruel.[1] Thus, in Hildwin v. State, 531 So.2d 124 (Fla. 1988), merely because the victim took several minutes to die does not mean this aggravating factor applied. That she had been kidnapped, taken to an isolated area, brutally beaten,

---

[1] This court's dicta in Hitchcock v. State, 578 So.2d 685 (Fla. 1990) that this aggravating factor pertains to the victim's perceptions rather than those of the defendant seems to overlook the requirement articulated in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) that for it to apply, the defendant must have "designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others."

and finally strangled did. Accord, Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Finally, as mentioned above, murders occurring in the victim's home or among relatives often tend to be especially heinous, atrocious, and cruel. Johnson v. State, 497 So.2d 863 (Fla. 1986); Huff v. State, 495 So.2d 145 (Fla. 1986).

Thus, the state cited no controlling case, and the factual similarities are so readily distinguishable that its argument has little persuasive impact. Bonifay's killing of Coker was not especially heinous, atrocious, and cruel.

The state understandably has a difficult time limiting this court's opinion in Omelus v. State, 584 So.2d 563 (Fla. 1991) that unless the defendant knew that a murder was going to be done in an especially atrocious, and cruel manner that aggravating factor could not apply to him. It attempts to restrict that case by citing conflict with the United States Supreme Court's opinion in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 137, 95 L.Ed.2d 127 (1987), but such effort ultimately fails. First, the state is wrong that the nation's high court "upheld a finding of heinousness." (Appellee's brief at p. 14.) The Arizona Supreme Court approved that factor, which the U.S. Supreme Court merely noted without either approving or condemning. It did not uphold this aggravating factor as the state alleges because the issue which that court focused on was whether a death sentence was proportionally warranted where the defendants had neither intended to kill the victims or had done so, but who nevertheless exhibited a reckless indifference to

human life. Tison, either factually or legally, has no relevance to this case.

Yet the state forces it application here by arguing that "'Reckless 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.'' (Appellee's brief at p. 15. Emphasis in quote.) Applying such a standard would mean that every contract killing would be especially heinous, atrocious, and cruel because when a person hires another to kill, the resulting murder would have to have been done with "reckless indifference" to the life of the victim.

Thus in this case, the state has no problem saying that "Archer had a reckless disregard for the victim's suffering," (Appellee's brief at p. 15), but then it would make the same argument about every contract killing merely because the defendant had contracted to kill someone. Such a contortion does not square with this court's limitation of this aggravating factor as articulated in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Reckless indifference" does not necessarily equate with being especially heinous, atrocious, and cruel in general, and it certainly does not do so in this case. There is no evidence

Archer intended Coker to suffer any "high degree of pain" or that he in any way wanted the victim to suffer unduly, Contrary to the court's finding (R 544), merely taking the life of another is not especially heinous, atrocious, and cruel.

Finally, the state argues the harmlessness of the court's error in finding this aggravating factor. Its analysis, however, falls short of convincing because it ignores the weight the jury may have given to this aggravating factor in reaching its recommendation of death. In Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), the nation's high court required "close appellate scrutiny of the import and effect of invalid aggravating factors to implement the the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." Id. at 117 L.Ed.2d 378. Such a strict demand cannot be met by merely considering how the trial court would have viewed the remaining aggravation and mitigation. Under the Florida scheme, the jury's recommendation carries great weight and the trial court must accept it unless virtually no reasonable person could agree with it. Tedder v. State, 322 So.2d 908 (Fla. 1975). Hence, if this court is to engage in a harmless error analysis, it must do more than simply revaluate the sentencing order without the aggravating factor.

> "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error

> analysis or reweighing at the trial or appellate level suffices to guarantee the defendant received an individualized sentence.

Id. 379. See also, Kennedy v. Singletary, Case No. 79,736 & 79,741 (Fla. April 30, 1992) (Kogan, concurring).

This court faces the similar problem that all the king's horses and all the king's men confronted when they came upon the fractured Humpty Dumpty. Reconstructing how the jury would have viewed the evidence had the court not instructed them on the especially heinous, atrocious, and cruel aggravating factor requires an omniscience this court does not pretend to have. Moreover, in light of the jury's 7-5 vote for death, it is not clear beyond a reasonable doubt that the improper instruction would have had no effect on the juror's deliberations and vote.

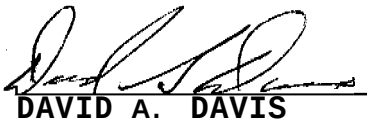
This court, therefore, cannot say that the lower court's error was harmless.

CONCLUSION

Based upon the arguments presented here, Archer respectfully asks this honorable court to either 1) reverse the trial court's judgment and sentence and remand for discharge, 2) reverse the trial court's sentence and remand for a new sentencing hearing before a new jury, or 3) reverse the trial court's sentence and remand for resentencing,

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL **CIRCUIT**

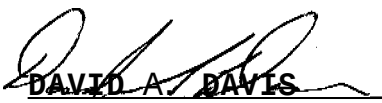


DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271453
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida **32301**
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail, to **Barbara C. Davis,** Assistant Attorney General, 210 N. Palmetto Avenue, Suite **447,** Daytona Beach, Florida **32114,** and **a copy** has been mailed to appellant, ROBIN LEE **ARCHER,** #216728, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 20th day of May, 1992.



DAVID A. DAVIS