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STATEMENT OF TYPE USED

I certify that the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

Appellant, Thomas Davis Woodel, will rely upon his initial brief in reply to Appellee's arguments as to Issue III.

ARGUMENT

ISSUE I

THOMAS WODEL WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL AND SUBJECTED TO CRUEL AND/OR UNUSUAL PUNISHMENT BY THE INSISTENCE OF THE COURT BELOW THAT THE PENALTY PHASE IN THIS CASE BE COMPLETED IN A SINGLE DAY.

Appellee takes the position that Woodel's issue has not been preserved for appellate review because defense counsel did not object vociferously enough to the trial court's insistence that the penalty phase in this case be completed in one day. However, in Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990), this Court wrote that "...the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const." Surely, a violation of such a "fundamental conception of fairness" must, in a capital case such as this, constitute fundamental error, cognizable on appeal whether or not defense counsel protested sufficiently in the lower court.

ISSUE II

THE EVIDENCE PRESENTED BELOW WAS INSUFFICIENT TO PROVE THAT THOMAS WOODEL WAS GUILTY OF THE OFFENSES SUBMITTED TO HIS JURY, NAMELY, PREMEDITATED MURDER, FELONY MURDER, ROBBERY, AND BURGLARY.

On the subject of premeditation, Appellee asserts at page 17 of its brief that there was no evidence in this case "to support any speculation of provocation, depravity or intoxication at the time of the murders." On the contrary, there was evidence of Thomas Woodel's intoxication at the time of the homicides both in the form of his statements to law enforcement authorities, and in the testimony of Woodel's sister, Bobbi, who said that Woodel told her he had been drinking beer prior to the offenses.¹

Woodel also stated to law enforcement personnel that Bernice Moody initially had the knife, and he took it away from her in order to get out of the trailer, thus indicating that he did not plan the murders (because he had no weapon when he entered the premises), and that his stabbing of the Moodys was a panic reaction when Bernice Moody yelled at him to get out of the trailer.

On page 18 of its brief, Appellee says that there was "no evidence other than Woodel's self-serving statements that these murders were not planned to support a suggestion that they were

¹ One of Woodel's penalty phase witnesses, Jessica Wallace, confirmed that Woodel have been drinking beer in the early morning hours preceding the killings.

anything other than premeditated." Of course, it was not up to Thomas Woodel to prove that the instant killings were no premeditated; it was up to the State to prove that they were premeditated, which the State failed to do.

On the subject of whether the taking of property from the Moodys was robbery or an afterthought, Appellee claims that "where no other clear motive for a murder has [sic] established, this Court has repeatedly upheld robbery convictions where property was taken from a murder victim during the same criminal episode..." Answer Brief of the Appellee, p. 21. The clear motive in the instant case was for Woodel to get out of the situation in which he found himself; therefore, the cases cited on page 22 of Appellee's brief are inapposite.

Appellee's contention on page 22 of its brief that Woodel's explanation that he entered the Moodys' trailer "in order to ascertain the time makes no sense" is quite correct. Woodel himself recognized after the fact that he was not in his right mind at the time of the incident (Vol. XV, p. 2244-2246), due to the amount of beer he had consumed, and he did not have a rational reason for approaching Bernice Moody on the morning in question, which is indicative of the degree of his intoxication.

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER THE EVIDENCE THE STATE PROMISED IN OPENING STATEMENT TO PRESENT TO THE JURY WAS HELD INADMISSIBLE.

On page 26 of its brief, Appellee asserts that, prior to the day Gayle Woodel was going to testify at the guilt phase of Thomas Woodel's trial, "the prosecutor reasonably believed that Gayle and Woodel had been divorced[,]" and that Gayle's testimony regarding statements Thomas made to her would therefore not be subject to the marital privilege. However, had the prosecutor done his homework and investigated properly before Woodel's trial, he would have discovered that Thomas and Gayle were not divorced.

On page 28 of its brief, the State mentions the fact that Thomas "Woodel himself told the police that he had hidden the knife behind the dresser in his bedroom." Contrary to the State's assertion, however, this was not "the same evidence that was excluded by application of the marital privilege..." Answer Brief of the Appellee, p. 28. Testimony from Gayle Woodel that Thomas told her to "get rid of the knife" would have been quite different and more prejudicial than the testimony that came in regarding Woodel's statements to the police as to where the knife was located, and the prosecutor's telling the jurors in opening statement that they would be hearing Gayle's testimony tainted their verdicts.

ISSUE V

THE EVIDENCE PRESENTED BELOW WAS INSUFFICIENT TO PROVE THAT THE KILLINGS WERE COMMITTED WHILE THOMAS WODEL WAS ENGAGED IN THE CRIME OF BURGLARY, OR THAT THE VICTIMS WERE PARTICULARLY VULNERABLE DUE TO ADVANCED AGE OR DISABILITY.

With regard to the aggravating circumstance of advanced age or disability, Appellee cites State v. Hootman, 709 So. 2d 1357, 1360 (Fla. 1998) for its "holding that once it has been established that the victim was of advanced years in age, the aggravator is conclusively shown)." Answer Brief of the Appellee, pp. 35-36. Actually, the "holding" in Hootman was that the aggravating circumstance set forth in section 921.141(5)(m) of the Florida Statutes could not be applied retroactively to a homicide which occurred prior to its effective date; the proposition of law cited by Appellee was dictum. Furthermore, this dictum is of questionable validity, in light of the plain language of the statute which requires the victim of the capital felony to have been "particularly vulnerable due to advanced age or disability..." in order for this aggravator to apply. That is, the clear language of the statute requires not merely advanced age, but that the victim was "particularly vulnerable" because of that advanced age (or disability).

Appellee also refers in a footnote which appears on pages 35-36 of its brief to a definition of "advanced age" set forth in

section 775.085(2) of the Florida Statutes. This statute has nothing to do with sentencings in capital cases, but deals with reclassification of crimes evidencing prejudice (i. e. "hate crimes"). Furthermore, the definition of "advanced age" found in the statute was not added until after the date the instant offenses were committed. The definition in the statute thus has no applicability to this case.

ISSUE VI

THE COURT BELOW DID NOT GIVE PROPER TREATMENT TO THE MITIGATING CIRCUMSTANCES IN THIS CASE, BECAUSE HE FAILED TO ASSIGN SPECIFIC WEIGHT TO EACH MITIGATOR AND USED AN INCORRECT LEGAL STANDARD IN EVALUATING THE EVIDENCE OF THOMAS WODEL'S INTOXICATION AT THE TIME OF THE OFFENSES.

Appellee's brief refers to the "only testimony of Woodel's possible intoxication at the time of the crime" as being his own "self-serving statements to law enforcement" and the testimony of Jessica Wallace. (Answer Brief of the Appellee, p. 39) However, additional evidence supporting Woodel's intoxication was presented through the guilt-phase testimony of Woodel's sister, Bobbi, who said that Woodel told her he had been drinking beer before the incident in question, and her penalty-phase testimony in which she read into evidence a letter from Woodel saying that he was drunk and not in the right frame of mind when the homicides occurred.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Thomas Davis Woodel, hereby renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2000.

Respectfully submitted,

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