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STATEMENT OF THE CASE

Appellant will rely upon his statement of the case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon his statement of the facts as presented in his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SEVER THE TWO OFFENSES.

The State argues that the trial judge did not abuse his discretion by denying Appellant's motion to sever the offenses. Relying on Gudinas v. State, 693 So. 2d 953 (Fla. 1997) and Rolling v. State, 695 So. 2d 278 (Fla. 1997), Appellee contends that the offenses at bar were properly charged in the same indictment and severance was unwarranted. Brief of Appellee. page 7-10.

Both Gudinas and Rolling are easily distinguishable from the case at bar. In Gudinas, the defendant made three separate unsuccessful efforts to forcibly enter one woman's car while she was inside. From his comments to her, it was evident that he wanted to rape her. Less than three hours later, in an adjacent parking lot, Gudinas raped and murdered another woman. Clearly the two criminal episodes were closely linked by both location and time. In addition, this Court noted that a "meaningful relationship" existed between the crimes because it could be inferred that the defendant's unsuccessful attack on one victim fomented the completed attack on the other.

Rolling involved five murders at three different crime scenes within a radius of one mile. During a three day period, Rolling stabbed five college students in their Gainesville apartments. This Court approved the trial court's joinder of the cases for trial on the ground that the incidents represented a crime spree amounting to "a single prolonged episode".

At bar, a much greater period of time separated the homicide of Denise Roach from the

homicide of Cristy Cowan. Appellee asserts that both homicides "were committed within seven to ten days of each other"¹. Brief of Appellee, page 12. However, other evidence in the record supports the trial judge's determination that the homicides were separated by "as many as fifteen (15) days" (I, R82). Witness Bonnie Jean Kruse testified that she had seen Denise Roach every day until Roach disappeared (VIII, T918). She thought that the last time she saw Roach was just before Mother's Day² (VIII, T923-4). In his statement to Detective Flair, Smithers said that he killed Roach on May 13 and put her body in the pond on the following day (IX, T1055-9). If true, this would be fifteen days earlier than the homicide of Cristy Cowan which occurred May 28.

Appellee's contention that "during this same time period Smithers was actively trying to persuade at least one other prostitute to leave the motel with him" (Brief of Appellee, page 12-3) also deserves scrutiny. Kruse testified that this incident took place "back in April sometime, the first part of April" (VIII, T925). Therefore, it predates the first homicide by roughly one month.

Accordingly, the trial court's finding of a 15 day period between homicides is supported by competent substantial evidence. This is much greater than the 72 hours in Rolling, not to mention the three hours in Gudinas. Appellee's conclusion that "Smithers' actions are one continuous episode over the course of little more than a week at most" (Brief of Appellee, page 13) is unsupported by the evidence. The killings were two discrete acts. Cf., Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993)

¹This time frame is based upon the testimony of the medical examiner, Dr. Hair. Based upon the decomposition of Roach's body, Dr. Hair said 7 to 10 days was "a ball park figure" for how much longer Roach's dead body had been in the pond (VII, T723). However, when asked whether Roach could have been in the pond for longer than ten days, Dr. Hair replied, "Oh, yes" (VII, T748).

² Appellant would ask this Court to take judicial notice of the fact that Mother's Day in 1996 was Sunday May 12.

(separation of 3 days between similar homicides did not warrant joinder).

Appellee goes on to contend that there was also a causal link between the two homicides. Brief of Appellee, page 13-4. It is asserted that "Smithers' success ... provided the impetus for him to repeat his performance days later." Brief of Appellee, page 13. Granted, had the body of Denise Roach been discovered earlier, Smithers would probably not have driven Cristy Cowan to the Seffner estate on May 28. If lack of detection were sufficient to establish a causal link, any criminal who repeated a crime because of initial success could have all of his offenses joined for trial. Such is not the law.

Appellee next argues that any error in joinder of the offenses is harmless because the crimes were so similar that evidence of each could be admitted in a trial for the other. Appellant already conceded in his initial brief that the jury's verdict of guilt for the murder of Cristy Cowan was not compromised by consideration of the evidence relating solely to the homicide of Denise Roach. However, the converse is not true; evidence of the Cristy Cowan murder undoubtedly contributed to the verdict of guilt for the Denise Roach homicide.

Certainly the facts of the two homicides were not "inextricably intertwined" as Appellee suggests. Appellant's admissions to the police about each offense were separated by "several hours" according to the trial court's finding in the order denying Appellant's motion to sever the offenses (I, R83). The killings themselves were discrete acts, each of which could be presented to a jury without reference to the other. Only the finding of Roach's body in the same pond as Cowan's was evidence that required reference to the other homicide in order to be placed in a proper context.

In a separate trial for the homicide of Denise Roach, it might be likely that the trial court would admit some evidence of the Cristy Cowan homicide under section 90.404 (2) of the Florida Evidence

Code. However, the court would have to weigh the probative value against the prejudicial effect pursuant to section 90.403, Florida Evidence Code for everything that the State would offer. The net result is that less evidence of the Cowan homicide would be presented to prove Smithers' guilt of the Roach homicide - perhaps a great deal less. To admit all of it would be to make the Cowan homicide a feature of the Roach case and reversible error. Therefore, the State cannot meet its burden of proof under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) that joinder of the offenses was harmless error as to Smithers' first degree murder conviction in the death of Denise Roach.

Regarding the question of harmless error in the penalty phase, Appellee asserts that the sentencing judge could have found each conviction as an aggravating factor in the sentencing of the other even if separate trials had been held. While this is true, it does not address the prejudice caused by the jury's consideration of both convictions as aggravation for the other. If the trials were held serially, the first jury could not consider the second homicide as an aggravating factor because the conviction would not yet exist. Needless to say, absence of a such a weighty aggravating circumstance would greatly improve Appellant's chances of getting a jury recommendation of life imprisonment.

In Cochran v. State, 547 So. 2d 928 (Fla. 1989), the defendant was convicted at separate trials for two first degree murders. At the first trial, the jury returned a life recommendation. After the second conviction, the jury recommended death, no doubt because the prior murder was presented as an aggravating circumstance. The trial judge decided to impose sentence for both murders at the same hearing.

At the Cochran sentencing, the judge used the second murder conviction as an aggravating circumstance applicable to the first murder and overrode the jury's life recommendation. On appeal to

this Court, it was held that the judge could properly find and weigh the aggravator even though it was not presented to the jury. However, the jury's recommendation of life still retained its great weight and was improperly overridden because of the substantial mitigating evidence.

At bar, the penalty phase prejudice to Smithers lies in his diminished opportunity to win a jury life recommendation on one of the homicides. Had there been a jury life recommendation on the first of two separate trials, the Tedder³ standard would have been applicable if the judge attempted to impose a death sentence anyway. Because Judge Fuente actually found both statutory mental mitigators as well as eight nonstatutory mitigators applicable (II, R256-9), the Tedder standard for a life override could not be met. Consequently, a life sentence would have been mandated.

Accordingly, Appellee's assertion that any error in joinder of the offenses is harmless with respect to the death sentences imposed on Smithers is demonstrably false.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

In Appellant's initial brief, his argument with respect to section A (Inquiry about a lawyer) was largely based upon the Fourth District's interpretation of Almeida v. State, 737 So. 2d 520 (Fla. 1999) which was presented in Glatzmayer v. State, 754 So. 2d 71 (Fla. 4th DCA 2000). Since that time, this Court quashed Glatzmayer; Case No. SC00-602 (Fla. May 3, 2001) [26 Fla. L. Weekly S279].

³Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Upon consideration of this Court's treatment of the Glatzmayer scenario and the cases from other jurisdictions cited in footnote 16 of this Court's Glatzmayer opinion, Appellant concludes that he cannot meaningfully distinguish the facts at bar from those cases where no constitutional error was found. Accordingly, Appellant abandons his argument under section A, while urging this Court to hold that his confession should have been suppressed for the reasons advanced in sections B, C and D.

B) Appeal to Religious Convictions as an Inducement to Confess.

Appellee, in her brief, refers to Detective Metzgar's calculated attempt to use an improper religious inducement to elicit incriminating remarks from Smithers as merely a "single passing reference to Christianity". Brief of Appellee, pages 23, 25. This Court should examine Detective Metzgar's actual testimony at the suppression hearing:

A. ... And in Mr. Smithers' particular case I had taken a little bit of background information on him from Detective Flair. And she told me he attended church at Plant City. Generally I have a speech that I use on most folks. In Mr. Smithers's case I told him, "You don't seem like a bad fellow. You haven't been in a lot of trouble in your lifetime. You're out there working and you don't appear to be the type of individual that just does nothing that makes an effort." And I knew that if he attended church -- of course, I'm a Christian and I explained to him that if he was a Christian -- and it was my belief based on the polygraph he wasn't telling the truth about this, that he might want to tell the truth about it, that that is probably the right thing to do.

Q. And after you told him that, you know, if he was a Christian that he should do the right thing -- do you remember, Detective, what words you used when you referred to his religious beliefs?

A. The Christian word that I used -- specifically, do I remember exactly what I said? No, ma'am. There is a lot of conversation in that time frame.

Q. And you told him that he should tell the truth?

A. It was my opinion that he should tell the truth, that's correct.

(SI, T86-7).

Appellee is of course correct when she notes that this Court has never reversed a conviction because a confession was obtained through a deceptive appeal to religious beliefs. Until it does, it is likely that the police will continue, like Detective Metzgar, to regard such ploys as legitimate tactics.

C) Need for Renewed Miranda Warnings.

Appellee argues that Smithers' signatures on the written forms giving consent for the polygraph and to be interviewed were sufficient to validate the post-polygraph interrogation. She cites Croney v. State, 495 So. 2d 926 (Fla. 4th DCA 1986) as authority for the State's position. In Croney, however, the defendant immediately confessed once he was told that he had performed poorly on the polygraph. The Croney court specifically distinguished the facts from those in United States v. Gillyard, 726 F. 2d 1426 (9th Cir. 1984) as follows:

However, in that case [Gillyard] the defendant's liberty had been essentially restrained, and he was extensively questioned over several hours. Here, the defendant's statements were volunteered without any questioning, he was not under arrest and had not sought advise of counsel. It is undisputed that he had been read the Miranda rights from a form which he signed after acknowledging he understood them.

495 So. 2d at 927.

At bar, the facts are much closer to those in Gillyard than to those in Croney. Smithers made no incriminating remarks except in response to questioning. Although the exact point in time where

Smithers was in custody may be debated, it was probably once he made an admission to Detective Metzgar and certainly by the time he admitted to the homicide of Cristy Cowan. Before he eventually confessed to the homicide of Denise Roach, he had been interrogated for two hours or more (SI, T78).

Moreover, Smithers, unlike Croney, was not read Miranda warnings. While the difference between giving consent after having the rights read out loud and simply signing a form after being given opportunity to read it may not appear significant, oral warnings clearly emphasize the importance of the suspect's choice. In a world where people are routinely asked to sign forms giving consent to the most trivial encroachments, or even to have the oil changed in their vehicles, an important decision such as waiver of constitutional rights should demand more attention than yet another signature on yet another preprinted form.

In United States v. Leon-Delfis, 203 F. 3d 103 (1st Cir. 2000), it was held that a defendant's pre-polygraph waiver of rights extended only to pre-test questioning and the polygraph test questioning itself. The court held that the defendant's confession elicited in post-polygraph questioning was inadmissible. This Court should reach the same result with respect to Smithers' post-polygraph admissions because renewed Miranda warnings were not given.

D) Sharon Smithers' Presence During the Interrogation.

The crucial distinction between what happened in Lowe v. State, 650 So. 2d 969 (Fla. 1994), cert. den., 516 U.S. 887 (1995) and the case at bar is that the police were not in the room when Lowe's girlfriend spoke to him. Similarly, in Arizona v. Mauro, 481 U.S. 520 (1987), there was no police interrogation of the defendant while his wife was present.

While recognizing that it was Smithers himself who requested his wife's presence during interrogation, the circumstances became so coercive that his admissions should not be considered voluntary. Appellant's confessions to the homicides of Cowan and Roach should have been suppressed by the trial court.

ISSUE III

FUNDAMENTAL ERROR OCCURRED WHEN
DEFENSE COUNSEL WAIVED APPELLANT'S
PRESENCE FOR A PRETRIAL HEARING WHERE
A DEFENSE MOTION IN LIMINE WAS HEARD
AND DENIED.

Appellee asserts that this Court's decision in Roberts v. State, 510 So. 2d 885 (Fla. 1987) should control because "Smithers, if present, could not have assisted defense counsel in arguing [the motion]". Brief of Appellee, page 37. Appellant disagrees. This "Motion in Limine" (I, R110-1) was not a purely legal question. The defendant could assist counsel by pointing out possible factual discrepancies in the prosecutor's representation of the evidence. The all-important question of whether the probative value of witness Bonnie Kruse's testimony about an earlier "date" with Smithers outweighed the considerable prejudice is precisely the type of issue where a defendant can assist his counsel.

Because the State cannot show that Smithers' absence at the pretrial hearing was harmless beyond a reasonable doubt, a new trial should be granted.

ISSUE IV

THE SENTENCING JUDGE ERRED BY FINDING
THAT THE ESPECIALLY HEINOUS,
ATROCIOUS OR CRUEL AGGRAVATING
CIRCUMSTANCE APPLIED TO THE HOMICIDE
OF DENISE ROACH.

Appellant agrees with Appellee's proposition that inconsistent and conflicting statements by a

defendant may be used as evidence to prove an aggravating circumstance. See, Johnson v. State, 465 So. 2d 499 (Fla. 1985); Hildwin v. State, 531 So. 2d 124 (Fla. 1988). However, both the Johnson and Hildwin opinions add the proviso that the statements must "bear indicia of reliability". 465 So. 2d at 506; 531 So. 2d at 129, n. 2. At bar, we must examine which elements in Smithers' conflicting accounts of the death of Denise Roach might relate to the HAC aggravating circumstance and bear some indicia of reliability.

To begin with, strangulation was not mentioned in either of Smithers' statements as a cause of Roach's death. In his statement to the police, Appellant admitted punching Roach in the face and shoving her against the garage wall (IX, T1056-8). Some tools and a piece of wood fell on her face (IX, T1058). He left her unconscious and bleeding on the floor of the garage (IX, T1058-9). When Smithers testified at trial, he told of a drug ringleader getting into an argument with Roach during the loading of a drug shipment (X, T1113). The ringleader took a hatchet out of the trunk of his car and hit Roach on the side of her head, causing her to stumble back into the garage (X, T113-5). Then he killed Roach with the hatchet "right there in front of me" (X, T1114). Smithers' participation was limited to dragging Roach's lifeless body to the pond (X, T1116).

Both of these statements should be compared to the physical evidence concerning how Roach died. The medical examiner, Dr. Hair, testified that Roach died from "the combined effects of stab wounds⁴ and blunt impact to the head with skull fractures and manual strangulation" (VII, T746). There were also sixteen puncture wounds to Roach's skull which were probably made with some sort of tool

⁴ She based her conclusion that Roach was stabbed on two one-inch slits in the clothing that Roach was wearing (VII, T726-7).

(VII, T736-8). The only consistent element between the statements and the physical evidence relates to the victim's skull fractures. One of these could possibly have been caused by a fist (VII, T732) and the other from "someone striking their head very hard on a hard surface" (VII, T734-5). These injuries are consistent with Smithers' original account of the homicide to the police.

The important question is whether there is competent substantial evidence to support the sentencing judge's finding that the "homicide was extremely torturous to the victim" (Sentencing Order, page 6; II, R250). If Smithers' trial testimony about Roach being killed by several blows from a hatchet while she was screaming had some indicia of reliability, there would be some support. However, none of the wounds found by the medical examiner on Roach's body could have been inflicted by a hatchet or small axe. Clearly Appellee does not believe that this homicide was committed by a drug ringleader sporting a gray goatee. Therefore, Appellee should not conclude that Roach "was screaming while being beaten with an axe". Brief of Appellee, page 44-5. Smithers' trial testimony should be ignored with respect to the HAC aggravating circumstance because it bears no indicia of reliability to the actual homicide.

What we are left with is a victim who suffered massive skull fractures. If these blows to the head came first, it is certain that Roach would have been unconscious during the manual strangulation, the apparent stab wounds, and the sixteen perforations in her head. Acts perpetrated upon an unconscious victim cannot be used to support the HAC aggravating circumstance. Jackson v. State, 451 So. 2d 458 (Fla. 1984); Jones v. State, 569 So. 2d 1234 (Fla. 1990). Where the State fails to establish more than speculation or inferences about the suffering of a victim, the HAC aggravating circumstance has not been proved. Knight v. State, 746 So. 2d 423, 435 (Fla. 1998); Robertson v.

State, 611 So. 2d 1228, 1232 (Fla. 1993). The evidence at bar, including Appellant's statement to the police, is consistent with an attack which quickly left the victim unconscious as in Elam v. State, 636 So. 2d 1312 (Fla. 1994). Accordingly, the finding of HAC as an aggravating factor should be struck.

ISSUE V

THE SENTENCING JUDGE ERRED BY FINDING
THAT THE COLD, CALCULATED AND
PREMEDITATED AGGRAVATING CIRCUM-
STANCE APPLIED TO THE HOMICIDE OF
CRISTY COWAN.

On page 49 of her brief, Appellee continues to assert that Denise Roach was killed with an axe only days before the Cowan homicide. As demonstrated by the medical examiner's testimony concerning the Roach homicide (see Issue IV, supra), there is no possibility that an axe was used to inflict the wounds on Roach's body. Moreover, it was reasonably shown that fifteen days separated the two homicides (see Issue I).

The cases cited by Appellee with reference to the CCP aggravating circumstance all have additional salient details supporting the aggravator which are lacking in the case at bar. For instance, in Zack v. State, 753 S0. 2d 9 (Fla. 2000), the defendant beat and raped his victim in her house. Then he stopped his attack to search for a knife in the kitchen. He returned with the knife, stabbed the woman to death, and stole her automobile to leave the scene. There was evidence that the crime was preplanned because Zack needed a vehicle to escape from the area where he was already wanted for another murder and thefts.

Similarly, in Suggs v. State, 644 So. 2d 64 (Fla. 1994), the victim was robbed, then driven to a secluded area and stabbed to death. While the case at bar shares the secluded nature of the site, the evidence shows that acts of prostitution were intended and consummated. Whether the killing of Cowan was also planned is a matter of speculation. Suggs, by comparison, had no reason other than witness elimination to take his victim to a remote area. The stab wounds he inflicted were "remarkably similar to wounds graphically demonstrated by photographs on page 99 in the book Deal the First Deadly Blow, recovered from the Defendant's home". 644 So. 2d at 70. Moreover, Suggs confessed to his jailhouse companions that he had a careful plan; "he was not going to be stupid this time". 644 So. 2d at 70.

Regardless of how much credence is given to Smithers' account of how the incident with Cristy Cowan transpired, there is no reason to doubt that the killing itself took place during an angry confrontation over money. Appellee's argument necessarily depends upon the inference that Appellant was so satisfied by the homicide of Roach that he planned an encore performance with Cowan. While this is a possibility, inference does not rise to the level of competent substantial evidence required to prove the cold, calculated and premeditated aggravating circumstance. See, Crump v. State, 622 So. 2d 963 (Fla. 1993).

Finally, this Court has often said that the CCP aggravating factor "is reserved primarily for execution or contract murders or witness-elimination killings". e.g., Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987). The homicide of Cristy Cowan cannot be classified as any of these. The sentencing judge erred by finding the CCP aggravating applicable.

ISSUE VI

THE TRIAL JUDGE ERRED BY FAILING TO
DECLARE A MISTRIAL DURING PENALTY
PHASE WHEN ONE OF THE STATE'S WIT-
NESSES INTRODUCED LACK OF REMORSE AS
A CONSIDERATION.

Appellee attempts to camouflage the presentation of evidence regarding lack of remorse by asserting that "the expert was describing the qualities of antisocial behavior". Brief of Appellee, page 57. Considering that the psychiatrist diagnosed Smithers as having antisocial personality traits and named lack of remorse as one such trait, the jury must have inferred that Smithers lacked remorse for his actions. What other conclusion could be drawn?

From an evidentiary standpoint, any of the antisocial personality criteria in the DSM-IV manual not applicable to Smithers would be irrelevant and inadmissible at trial. Whether or not the error was sufficiently prejudicial to warrant a mistrial, this Court should admonish the State for continually seeking inventive methods to violate this Court's rejection of lack of remorse evidence as a proper consideration for the penalty jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ___ day of October, 2001.

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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