

IN THE SUPREME COURT OF FLORIDA

MARK A. DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,551

**FILED**  
SID J. WHITE

JUN 2 1989

CLERK, SUPREME COURT

By

Deputy Clerk

ON APPEAL FROM THE PINELLAS COUNTY CIRCUIT COURT

SUPPLEMENTAL BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

PEGGY A. QUINCE  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 333602  
(813) 272-2670

COUNSEL FOR APPELLEE

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## SUMMARY OF THE ARGUMENT

The one photograph and videotape appellant claims were inflammatory were properly admitted by the trial court. The test for admissibility of photographs is relevancy not necessity. Bauldree v. State, infra. Both the photograph and the videotape were relevant and helped to explain the testimony of the victim's injuries given by the medical examiner. Additionally, in error in the admission into evidence of photograph 11A and the portion of the videotape which was objected to is harmless. See, State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

## ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE PHOTOGRAPH 11A AND THE VIDEOTAPE SINCE BOTH WERE RELEVANT TO ISSUES TO BE PROVEN AT TRIAL

At trial the defense attorney objected to the introduction of photograph 11A and to a portion of a videotape of the crime scene including the victim's body. The portion of the tape objected to includes the appearance of the medical examiner and the turning over of the body. (R1076, 1079) The prosecutor indicated the photograph was important because it was a second shot of the victim's head, taken at a different angle from an unobjected to photograph. Together the two pictures demonstrated the multiple wounds on the victim's neck. (R1000) The videotape depicted the multiple wounds inflicted on the decedent. The medical examiner indicated there were eleven stab wounds in the

victim's back, four stab wounds to the left side of the neck, one wound across the middle of the neck and two stab wounds on the right side of the neck. Additionally, there were two stab wounds above the breast and one wound below the breast. There were four stab wounds to the abdomen and bruises to both eyes, the result of multiple blows to the face. These were the wounds depicted in the videotape. The videotape also depicts the murder scene itself. (R1078-1080)

The courts of this State have consistently held the test for admissibility of photographs alleged to be gruesome and/or inflammatory is relevancy, that is whether the photographs are relevant to any issue required to be proven in the case. ~~See~~, State v. Wright, 265 So.2d 361 (Fla. 1972); Bauldree v. State., 284 So.2d 196 (Fla. 1973) and Booker v. State, 397 So.2d 910 (Fla. 1981). This Court said in Booker, "Photographs are admissible if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the court and jury in finding the truth." Appellant neither alleges nor demonstrates the photograph and videotape do not properly depict the crime scene or the condition of the body. Appellee submits the evidence was relevant to issue to be proven at trial and aided the jury in finding the truth.

During the argument before the trial court on the admissibility of the tape the prosecutor indicated there are certain things depicted on the tape which is not captured in any of the photographs. (R1082-1083) She also argued the videotape

was relevant on the issue of premeditation and to refute the claim of self-defense made by appellant. (R10833) In Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981), this Court said:

... The basic test of admissibility of photographs, however, is not necessity, but relevance. Bauldree v. State, 284 So.2d 196 (Fla. 1973). Photographs can be relevant to a material issue either independently or by corroborating other evidence. **State v. Wright**, 265 So.2d 361 (Fla. 1972).

... Thus, Young v. State, [234 So.2d 341 (Fla. 1970)] and the cited case of Leach v. State [132 So.2d 329 (Fla. 1961), **cert. denied**, 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962)] recognized that even relevant photographs sometimes must be excluded if they are unduly prejudicial, but the pictures in the present case were not repetitive as in Young and were of greater relevance. We hold that all the photographs admitted were relevant either independently or as corroborative of other evidence, specifically, the testimony of witnesses. They were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted. The photographs were properly admitted. (emphasis added)

The photograph and tape, sub judice, were also admissible to corroborate the testimony concerning the number of wounds inflicted to cause the death.

The mere fact that the photographs may **be** somewhat gruesome or inflammatory does not require their exclusion. In Straight v.

State, supra., the court affirmed the admission into evidence of photographs of a decomposed body. Accord, Henderson v. State, 463 So.2d 196 (Fla. 1985). Photographs of the skeletal remains of the victim were held admissible evidence in Mills v. State, 462 So.2d 1075 (Fla. 1985). This Court affirmed the admission of multiple photographs in Funchess v. State, 341 So.2d 762 (Fla. 1976)

The one photograph and videotape which appellant complains of were relevant and admissible. As the prosecutor indicated, these items were relevant on the issues of premeditation and self-defense. The trial court did not err in admitting these items into evidence as they aided the jury in the truth finding process.

Appellee further submits any error in the admission of this evidence is harmless under the circumstances of this case. The victim, Orville Landis, murdered in his apartment at the Gandy Efficiency Apartments. He was last seen at approximately 8:30 on July 1, 1985. He was not seen during the morning and afternoon of July 2; therefore, Beverly Castle asked Carl Kearney to check Landis' apartment. Kearney observed Landis face down in a pool of blood on the mattress in the apartment. (R969-970) The police was called to the scene and saw numerous stab wounds in the body, and a butcher knife in the trash can.

At approximately 11 or 12 o'clock on July 1, appellant arrived at Beverly Castle's door saying he had to leave town right away, and he would not be seen for two or three years.

(R966-967) Appellant then went to Kimberly Rieck's apartment to get a pair of socks; he again said he would not be around for two or three years. (R933-934) Appellant was seen driving away in Landis' car. (R968) This defendant had earlier told Rieck he planned to get Landis drunk and take whatever he could from him. (R928) He also told Beverly Castle he was going to rip-off Landis and do him in, (R962)

**The** appellant admitted to Shannon Stevens and to law enforcement that he killed Landis, He told Stevens he killed Landis when Landis woke up during appellant's attempt to rob him. (1205) He indicated to law enforcement he struck Landis after Landis grabbed his "nuts"; he stabbed Landis with a butcher knife he had taken from Landis. (R1275-1276) Appellant stated he then got a smaller knife which he used to slit Landis' throat and stab Landis several more times. (R1276) The defendant also admitted to taking money from Landis' wallet and driving Landis' car to Tampa. (R1277) A fingerprint found on a beer can in Landis' apartment was identified as appellant's fingerprint. (R1183)

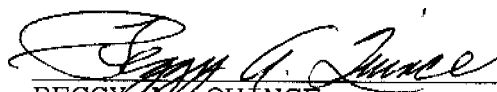
The evidence which linked appellant to this crime was overwhelming and clearly conclusive. There is no reasonable possibility that the admission of the photograph and videotape, if error, affected the verdict. State v. Diguilio, supra.

CONCLUSION

Based on the foregoing arguments and citations of authorities the trial court's admission into evidence of photograph 11A and the videotape should be affirmed.

Respectfully submitted,  
ROBERT A. BUTTERWORTH

ATTORNEY GENERAL

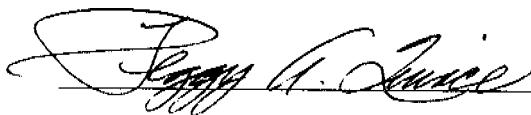


PEGGY A. QUINCE  
Assistant Attorney General  
Florida Bar Number 261041  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief of the Appellee has been furnished by U.S. Mail to Aubrey O. Dicus, Jr., Attorney for Appellant, P.O.Box 41100, St. Petersburg, Florida 337433, this 31th day of May, 1989.



Of Counsel for Appellee