

**IN THE
INDIANA SUPREME COURT**

CAUSE No.: 45S00-1312-LW-00512

ROBERT LEWIS, III	)	Appeal from the Lake County Superior Court
Appellant (Defendant Below)	)	
	)	
v.	)	Lower Cause No.: 45G03-1104-MR-3
	)	
STATE OF INDIANA	)	
Appellee (Plaintiff Below)	)	The Honorable Diane Ross Boswell, Judge

BRIEF OF APPELLANT

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Appellee (Plaintiff Below)	)	The Honorable Diane Ross Boswell, Judge

STATEMENT OF JURISDICTION OF THE INDIANA SUPREME COURT

Robert Lewis, III was convicted of Murder in the Perpetration of Criminal Deviate Conduct and Resisting Law Enforcement (Class D felony) and was sentenced to Life Without Parole. Therefore, pursuant to Rule 4A(1)(a) of the Rules of Appellate Procedure the Supreme Court has jurisdiction over this direct appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. ~~Whether there was sufficient evidence to prove beyond a reasonable doubt that Lewis committed the crime of criminal deviate conduct?~~
2. Whether the word "shall" in I.C. 35-50-2-9(g) must be viewed as a word of mandate to trial judges or does statutory interpretation jurisprudence support treating "shall" as "may" in light of the intent of the statute?
3. Whether the trial court's sentencing order is inadequate under *Harrison* and *Pittman*?
4. Whether the trial court erred in admitting evidence of Lewis' past conduct?
5. Whether the trial court erred in failing to instruct the jury on circumstantial evidence?
6. Whether the sentence of Life Without Parole is inappropriate in light of the nature of the offense and character of the offender?

STATEMENT OF THE CASE

1. Information and Probable Cause Affidavit Filed

On April 7, 2011 the State of Indiana filed a probable cause affidavit and criminal information alleging that Robert Lewis, III committed murder and resisting law enforcement, a Class D felony. App. Vol. I, p. 21-27. The murder charge alleged, in pertinent part as follows:

“...that on or about April 2, 2011, in the County of Lake, State of Indiana, Robert Lewis, III did knowingly or intentionally kill Jennifer Kocsis, contrary to I. C. 35-42-1-1...”

2. Amended Information Filed

An amended information was filed on June 15, 2011 adding four felony counts and a request for life imprisonment without parole. The amended information charged Lewis with the following additional counts:

COUNT II

[MURDER IN THE PERPETRATION OF CRIMINAL DEVIATE CONDUCT]

“...that on or about April 2, 2011, in the County of Lake, State of Indiana, ROBERT LEWIS III did kill Jennifer Kocsis while committing criminal deviate conduct, contrary to I.C. 35-42-1-1...”

COUNT III

[MURDER IN THE PERPETRATION OF ROBBERY]

“...that on or about April 2, 2011, in the County of Lake, State of Indiana, ROBERT LEWIS III did kill Jennifer Kocsis, while committing robbery, contrary to I.C. 35-42-5-1...”

COUNT IV

[ROBBERY (A)]

“...that on or about April 2, 2011, in the County of Lake, State of Indiana, ROBERT LEWIS III did knowingly or intentionally take property to-wit: keys, from the person or presence of Jennifer Kocsis, which resulted in serious bodily injury to Jennifer Kocsis, contrary to I.C. 35-42-5-1...”

COUNT V

[CRIMINAL DEVIATE CONDUCT (A)]

“...that on or about April 2, 2011, in the County of Lake, State of Indiana, ROBERT LEWIS III did knowingly or intentionally cause Jennifer Kocsis to perform or submit to deviate sexual conduct when Jennifer Kocsis was compelled by force or imminent threat of force, resulting in serious bodily injury to Jennifer Kocsis, contrary to I.C. 35-42-4-2...”

[REQUEST FOR LIFE IMPRISONMENT WITHOUT PAROLE]

The State of Indiana, Bernard A. Carter, Prosecuting Attorney for the 31st Judicial Circuit, pursuant to I.C. 35-50-2-9, now seeks a sentence of LIFE IMPRISONMENT WITHOUT PAROLE for the murder of Jennifer Kocsis based upon the existence of the following aggravating circumstance and in support thereof the State would show the Court that

On or about April 2, 2011 ROBERT LEWIS III intentionally killed Jennifer Kocsis while committing or attempting to commit criminal deviate conduct.

[REQUEST FOR LIFE IMPRISONMENT WITHOUT PAROLE]

The State of Indiana, Bernard A. Carter, Prosecuting Attorney for the 31st Judicial Circuit, pursuant to I.C. 35-50-2-9, now seeks a sentence of LIFE IMPRISONMENT WITHOUT PAROLE for the murder of Jennifer Kocsis based upon the existence of the following aggravating circumstance and in support thereof the State would show the Court that

On or about April 2, 2011 ROBERT LEWIS III intentionally killed Jennifer Kocsis while committing or attempting to commit robbery.

App. Vol. I, p. 43-46.

3. **Jury Trial**

A trial by jury was held on September 30th, October 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th and 11th of 2013. App. Vol. I, p. 1-8. Trial Transcript, Vol. 1-13. The jury returned verdicts of guilty on: Count I, murder; Count II, murder in the perpetration of criminal deviate conduct; Count V, criminal deviate conduct; and Count VI resisting law enforcement; and returned verdicts of not guilty of Count III, murder in the perpetration of robbery; and not guilty of Count IV, robbery. App. Vol. I, p. 199-204; Tr. p. 1760.

4. **Life Without Parole / Bifurcated Trial**

After the trial on the guilty phase, the case was presented to the jury on the State's request

for life without parole. Tr. p. 1766. Prior to beginning the second part of the bifurcated proceedings, juror number 313 presented a note to the court explaining that he had been pressured into a verdict after not being able to reach a verdict for the murder and criminal deviate conduct counts. Tr. p. 1774. The court heard arguments and ruled that the jury cannot impeach their own verdict and proceeded with the life without parole part of the trial. Tr. p. 1779-1787.

5. **Jury Cannot Reach Recommendation**

The jury could not reach a verdict as to whether the State proved its aggravator beyond a reasonable doubt. Tr. p. 1834-1835. Accordingly, they could not proceed to the life without parole recommendation. Id.

6. **The Trial Judge Imposes Life Without Parole In The Final Phase Of The Trifurcated Proceeding**

The sentencing hearing was continued to November 25, 2013, wherein Judge Boswell was required to decide whether Lewis should be sentenced to life without parole. Sent. Tr. p. 1-73. Judge Boswell found that the State proved the aggravator beyond a reasonable doubt and that it outweighed the mitigator. App. Vol. I, p. 209. Judge Boswell opined that once the court found that the aggravator outweighed the mitigator, the court did not believe that a term of years was an option: "...we're going to proceed today and I'm going to interpret the statute the way I read it because I don't see where it says - - it clearly says the Court - - jury has three options, but when it lists what - - when you revert to the case as if it were tried to the Court, it does not list - - it does not say that the Court could find a term of years or life without parole. Sent. Tr. p. 45, "Yes, that's what the - - that's how I read the statute, that I must impose the term of life without parole". Id. P. 46.

7. **Notice of Appeal**

Lewis filed a timely Notice of Appeal on December 27, 2013 and this direct appeal ensued. App. Vol. I, p. 9-13.

STATEMENT OF THE FACTS

In the evening of April 1, 2011 Robert Lewis, III called his friend Rodney Taylor and asked Taylor if he wanted to go to Pepe's Restaurant and Bar in Griffith, Indiana. Tr. p. 1156. Taylor agreed to pick Lewis up from Lewis' mother's home in Gary. Tr. p. 1157. Taylor had been drinking at another bar when Lewis called. Tr. p. 1156. When they arrived at Pepe's they ordered shots of tequila and pitchers of beer. Tr. p. 1159. Taylor observed that when Lewis drank alcohol his personality changed from "like a nice guy to a meaner person...". Taylor passed out at the table and when he woke up he saw Lewis and four or five women sitting at their table. Tr. p. 1168.

Lewis was also known by the nickname of "Dollar Rob". Tr. p. 196. Rebecca Hixon was also at Pepes on April 1, 2011. Tr. p. 206. She knew Lewis beginning in 2010 when she met him at Pepes. Tr. p. 197. She next saw him at her friend, Leonica's house. Tr. p. 198. Hixon observed that Lewis "got up in her face and started yelling" at a female friend after Lewis had been drinking at Leonica's house. Tr. p. 205.

On April 1, 2011, Hixon spoke with Lewis several times during the night at Pepes. Tr. p. 209-2017. She overheard Lewis turn down a ride from his friend, Taylor, and she saw Taylor leave him. Tr. p. 2017. Lewis began to sexually pursue Hixon. Tr. p. 213. Lewis asked Hixon to give him a ride home but she refused. Tr. p. 214. Lewis became angry and persisted so Hixon asked the bartender/waitress, Tracy Harris, to "run cover" or block Lewis' view by speaking to him so Hixon

and her companion could leave unnoticed. Tr. p. 218. Lewis had asked the bartender/waitress, Tracy Harris repeatedly for a ride home and she refused. Tr. p. 277. Lewis kept asking Harris if they could “fuck”. Tr. p. 278. At one point, Lewis attempted to pull Harris closer to him by pulling on her pant leg. Tr. p. 279.

Jennifer Kocsis arrived at Pepe’s at approximately 1:15 a.m. Tr. p. 386. She was a regular patron who came in for Karaoke weekly. Tr. p. 384-386.

Jennifer was close friends with Ronald Sutton, the d.j. at Pepe’s who ran the Karaoke events. Tr. p. 382-385. Jennifer sang two songs, and one was a duet with Sutton. Tr. p. 389. After the songs, it was closing time at the bar. Sutton spoke with Jennifer at about 2:01 a.m. and she explained that she was going to give Lewis a ride “because he lives on Elmer” and that street was near her house. Tr. p. 390-395. Sutton watched Jennifer voluntarily walk out of the bar with Lewis and they got into Jennifer’s car. Tr. p. 396. Nothing unusual was observed about the couple as they left.

Sutton left Pepe’s and stopped briefly at another near by bar, Bone Dry, but didn’t see anyone he knew so he did not stay. Tr. p. 397. Sutton left Bone Dry and went directly to Jennifer’s house, to make sure she got home safely. Id. When Sutton arrived, Jennifer wasn’t there and the lights were out, so he called her. Tr. p. 397. She did not answer the call, so Sutton sent a text message. Id. Sutton then traveled to Elmer street to look for Jennifer’s car. Tr. p. 399. Sutton went back again to Jennifer’s house and determined that she wasn’t there so he called the Griffith Police Department. Tr. p. 400. Sutton went to his brother’s house and eventually slept. Tr. p. 403. He woke up at 10:00 a.m. and returned to Jennifer’s house and found that she was not home. Tr. p. 404.

Sgt. Dawes of the Griffith Police Department became involved with a missing persons report

called in by Jennifer's mother Linda Carey on Saturday, April 2nd. Tr. p. 422-424. Detective Mance overheard the report and told him that an unidentified white female homicide victim was found in Gary that morning. Tr. p. 425. Officer Tharp requested identifying information, including tattoos from Carey. Id. Carey told them Jennifer had a tattoo on her shoulder that read "Dad" and a tattoo of Indian praying beads along with a belly button piercing and her hair color. Id. Sgt. Dawes spoke with Investigator Gutierrez of the Lake County Corner's Office and they were about to match the tattoos with the "Jane Doe". Tr. p. 426. Several officers arranged a viewing of the surveillance videotape at Pepe's. Tr. p. 446-448.

Officer Geyer of the Gary Police Department was working patrol on April 2, 2011. Tr. p. 462. He received a dispatch regarding a dead body at Riley School. Tr. p. 462. The call came from a man who took his children to play basketball at the school's outdoor basketball court. Id. Geyer and Cpl Quasney located the body of a white, female face down. Tr. p. 471. She was wearing a blue bra and her underwear and shirt were pulled down around her knees. Tr. p. 471. Other articles of clothing surrounded her and there was a large pool of blood around her head, along with blood splatter on the building. Id. Jennifer's car was found three or four blocks from her body. Tr. p. 505.

Dr. John Cavanaugh, a forensic pathologist with the Lake County Corner's Office examined Jennifer's body. Tr. p. 649. Dr. Cavanaugh opined that the cause of her death was "multiple blunt-force injuries and manual strangulation". Tr. p. 693. Specific injuries were determined to be: a broken nose; forehead lacerations; lacerations on face and back of head; a broken jaw; a chipped tooth; fracture of hyoid bone; bruising and scraping from the jaw to the collarbone; scrapes and bruises to hands and knees; a "hand" like pattern on the buttocks; classical or textbook strangulation markings. Tr. p. 655-676.

A sexual assault kit was used by Dr. Cavanaugh. Anal swabs were used to take samples from both the outside anal ring and also the inside of the anus. Tr. p. 700-701. Dr. Cavanaugh observed that the anus was of normal position and configuration with no abnormalities. Id. There were no injuries to suggest penetration of the anus. Id. Shawn Flagg, a forensic DNA analyst at the Indiana State Police Laboratory in Lowell examined evidence in the instant case. Tr. p. 1376-1379. Tests were run on evidence for blood, semen, and saliva. Tr. p. 1390. Flagg's testing did not result in the ability to state with an scientific certainty that there was semen present in the vaginal and the anal swabs. Tr. p. 1443. Similarly, no semen was detected from the oral swabs. Tr. p. 1444. Lewis could not be excluded as a "possible contributor", or "potential contributor". Tr. p. 1417. While there was no evidence of semen, regarding the source of the DNA, "it could be any other body fluid" or skin cells (saliva, sweat, etc. Tr. p. 1490).

Chakole Spurlock knew Lewis since junior high school. Tr. p. 860. They were friends but became romantically involved (in a "physical relationship") in 2002 through 2011. Tr. p. 865. The State of Indiana gave Spurlock immunity in consideration for her testimony and cooperation against Lewis. Tr. p. 867.

On April 1, 2011 Spurlock was scheduled to work from 6 p.m. to 6 a.m. Tr. p. 870. Lewis called her at about 11:00 p.m. and asked her to come and meet him at Pepe's. Tr. p. 872-873. He called again and asked for her to pick him up. She thought that Lewis sounded like he needed help, so she told her supervisor that she would be leaving work and she punched out at 2:13 a.m. Spurlock drove from Hammond to Pepe's and when she arrived she noticed that there were no cars in the lot. Tr. p. 880. She called Lewis' cell phone, then sent a text message. Tr. p. 881. She eventually spoke with Lewis and he asked Spurlock to pick him up at his parents house in the 44th block of Gary. Tr.

p. 882. She pulled up to Lewis' parent's house and Lewis walked to the car wearing navy blue house slippers. Tr. p. 887. Lewis got into the front passenger seat and Spurlock saw that there was blood on Lewis' hands and he showed her some bloody clothing he had inside of his jacket. Tr. p. 801. Lewis told her that his friend Rodney shot a man in the stomach that was having an affair with Rodney's wife. Id. Lewis said that he (Lewis) kicked the man in his face and "broke his shit" (meaning "broke his face"). Tr. p. 889. Lewis showed her a bloody white jacket and bloody white US Polo gym shoes. Tr. p. 890. She saw blood on his jeans and his white hat. Tr. p. 892. Lewis told Spurlock that they needed to get a room for three days and lay low. Tr. p. 893. Lewis told her to drive down 47th and Pierce and he threw the shoes out of the car window. They drove to the Dollar Inn motel but it was full, so they got a room at the Comfort Inn. Tr. p. 897. Lewis told her he was going to hell. Tr. p. 896. They fell asleep. Lewis woke her up once in the night because he wanted to have sex and she refused. They left the room at about 7:00 a.m. because he wanted to retrieve his shoes and pick up some shorts to go swimming at the motel. Tr. p. 909-911. Lewis told her he needed to burn the clothing. Tr. p. 911. Lewis retrieved the shoes. They drove to an alley behind her mother's house and Lewis set the clothes on fire. Tr. p. 914. He also threw some keys into the fire. Id. Lewis got his shorts and they stopped at a liquor store then returned to the motel. Tr. p. 928.

Spurlock left Lewis for an hour or two so she could check on her children, then she returned to the motel to find Lewis visiting in the room with Rodney Taylor and Kendra. Tr. p. 929. Rodney had phoned Lewis to check on him and Lewis told him he had a jacuzzi room and had "females over at the room", and Lewis invited Rodney to join them. Tr. p. 1174.

When Taylor arrived at 1:00 p.m. on April 2, 2011 he saw that there was no jacuzzi. Id.

Lewis told Taylor that after Taylor left him at Pepe's, "his night went bad". Tr p. 1176. Lewis explained that he got a ride from Pepe's from his girlfriend and they went to a gas station where a male asked Lewis for a "cigarette or cigarette lighter" and Lewis shot the man in the chest. Tr. p. 1176. Lewis claimed that he emptied his clip on the man. Tr p. 1173. Lewis attempted to persuade Taylor that he was telling the truth so he showed his jeans with the blood on his jeans. *Id.* Lewis told him that he set his shirt and shoes on fire. Tr. p. 1179. Lewis asked Taylor to put some money on his "commissary" at the jail if he got arrested. Tr. p. 1180.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT LEWIS COMMITTED THE CRIME OF CRIMINAL DEVIATE CONDUCT

A. The Burden of Proof

Scrutiny, in the strictest sense, of whether the evidence is sufficient to prove that Lewis committed¹ the offense of criminal deviate conduct is critical in today's case because the State relied upon proof of the offense as the aggravator to request the sentence of life without parole. I.C. 35-50-2-9. After the jury returned its verdicts at the guilt phase, the State sought, at the second phase, a

¹ While the life without parole statute provides that the State may elect to charge Lewis with intentional killing while attempting to commit deviate conduct, the State instead charged Lewis only with intentional killing while actually committing criminal deviate conduct. Hence, Lewis contends that the State was bound by that election in the charging information and that the trial court's finding of the aggravator that includes the alternative of attempt is error. It is not clear whether Judge Boswell found that the State's proof satisfied the attempt or the actual commission. App. Vol. I, p. 209 (Lewis "intentionally killed Jennifer Kocsis while committing or attempting to commit..."). This error is discussed with more detail under Argument III, wherein Lewis also contends that the Order is inadequate because it does not contain the trial court's personal conclusion as to whether the sentence is appropriate based on the offender and the crime. *Pittman v. State*, 885 N.E. 2d 1246 (Ind. 2008).

recommendation of life without parole from the jury, however, the jury could not reach a unanimous verdict on the initial issue of whether the State proved its aggravator (that Lewis intentionally killed Jennifer Kocsis while committing criminal deviate conduct). Since the jury could not reach a verdict on the threshold question, the jury could not proceed as to whether they recommended life without parole. I.C. 35-50-2-9(f). At the third phase of the trifurcated proceeding, Judge Boswell, determined that there was proof beyond a reasonable doubt that Lewis intentionally killed Kocsis while committing or attempting to commit criminal deviate conduct and imposed a sentence of life without parole.

The United States Supreme Court has held that the Due Process Clause of our federal constitution protects a defendant against convictions except upon proof beyond a reasonable doubt of every fact necessary to prove the crime with which he is charged. *In re Winship*, 397 US 358, 90 S.Ct. 1068, 25 L.Ed. 2d 318 (1970); U.S. Const. Amend. 6 and 14. This burden of proof is codified in Indiana at I.C. 35-41-4-1. Our state Supreme Court has explained that more than a mere scintilla of proof of the elements are required, rather, proof must be beyond a reasonable doubt. *Vuncannon v. State*, 254 Ind. 206, 258 N.E. 2d 639 (Ind. 1970). This is a case predicated upon circumstantial evidence.²

² The parties and the court were charged with knowledge of *Hampton v. State*, 961 N.E. 2d 480 (Ind. 2012) handed down by our Supreme Court a year prior to the instant trial. In *Hampton* the Court held that DNA evidence with respect to a murder and criminal deviate conduct charge was circumstantial evidence (rather than direct evidence) of the defendant's actus reus of the offenses as would warrant a "reasonable theory of innocence" instruction. No such instruction was requested, nor given. In fact, no jury instruction regarding circumstantial evidence was given. Lewis asserts below, that the trial court had a duty to sua sponte instruct the jury in this circumstantial evidence case after *Hampton*, that "in determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be conclusive and sure as to exclude every reasonable theory of innocence". 961 N.E. 2d at 491.

B. The Elements Of The Offense And The Failure Of Proof

“Deviate sexual conduct” is defined at I.C. 35-31.5-2-94 as follows:

- 1) a sex organ of one (1) person and the mouth or anus of another person; or
- 2) the penetration of the sex organ or anus of a person by an object.

The State’s case was predicated upon circumstantial evidence of DNA derived from the body of Jennifer Kocsis.³ Accordingly, the State was required to prove, beyond a reasonable doubt, that Lewis engaged in an act with Kocsis involving his sex organ and her anus; or penetration by Lewis of the anus of Kocsis by an object. I.C. 35-31.5-2-94.

The standard of review when there is a challenge to the sufficiency of the evidence is well-settled: a conviction will be reversed due to insufficient evidence where, considering only the evidence and reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, the Supreme Court concludes that no reasonable fact finder could find each of the elements of the crime proven beyond a reasonable doubt. *Robertson v. State*, 765 N.E. 2d 138 (Ind. 2002); *Forrest v. State*, 757 N.E. 2d 1103 (Ind. 2001). Lewis contends that no reasonable fact finder could have found that each element of criminal deviate conduct was proven.

³ As explained in *Hampton*, 961 N.E. 2d at 494, the DNA evidence with respect to the sexual deviate conduct offense was circumstantial and not conclusive. The DNA evidence in *Hampton*, collected from the victim was consistent with a profile of the defendant’s DNA “to a degree of scientific certainty” yet it is circumstantial because it does not prove whether the act was consensual or whether compelled by force. The DNA results in today’s case resulted in the expert opinion that Lewis could not be excluded as a “possible contributor” and that the DNA had no evidence of semen and “could be any other body fluid”. Tr. p. 1490. This circumstantial evidence does not rise to the scientific certainty featured in *Hampton*, and provides a heightened basis of support for reversal based upon insufficient evidence when considered with forensic pathologist Dr. Cavanaugh’s opinion that the anus was of normal configuration with no abnormalities and there were no injuries to the anus to suggest penetration of the anus.

The facts most favorable to the conviction for criminal deviate conduct find that Lewis had been drinking at Pepe's and had asked two other females prior to Kocsis for a ride home. Tr. p. 214; 277. Lewis repeatedly asked Rebecca Hixon to have sex with him and she refused. Tr. p. 278. Kocsis voluntarily left Pepe's with Lewis at closing to give him a ride. The body of Kocsis was found and she was wearing a bra and her underwear and skirt were pulled down around her knees. Tr. p. 471. Two swabs for DNA were taken with one swab of the outside rim of the anus and a second one inserted into the anus without a cleansing of the rim and outside area of the anus prior to insertion. Bruising of one cheek of the buttocks was found, possibly consistent with being caused by a hand. Tr. p. 681.

Looking first to the penetration component of criminal deviate conduct, there is circumstantial evidence of DNA around the anus. The manner in which forensic pathologist Dr. Cavanaugh collected the samples is greatly problematic and fatally suspicious of contamination. First, Cavanaugh swabbed the outside area of the ring of the anus, Tr. p. 700-701. Another swab was then used without first cleaning the outside of the anus. Instead, the swab necessarily touched the outside area before insertion. Clearly, the tip of the second swab would pick up whatever DNA existed on the outside and carry it into the inside of the anus. This technique, when coupled with the facts that: (1) the States expert explained that the DNA could be from any bodily fluid or skin cells, and (b) physical evidence or abnormalities to suggest penetration were not found by Dr. Cavanaugh, lead to the result that neither penetration nor an act involving Lewis' penis and Kocsis' anus can be shown beyond a reasonable doubt. *Winship*.

Downey v. State, 720 N.E. 2d 794 (Ind. App. 2000) is instructive. Downey's conviction for child molesting by criminal deviate conduct was reversed where the evidence showed that Downey

rubbed his penis between the child's buttocks. The State argued that a jury could have reasonably inferred that an act involving the anus was committed. The Court of Appeals rejected the State's argument and held that the evidence was insufficient to prove beyond a reasonable doubt that there was an act involving the defendant's penis and the child's anus.

As *Hampton* instructs when considering the circumstantial evidence of DNA, could this case be one where consensual sex went horribly wrong resulting in a death by beating and strangulation? Was the non-semen DNA from sweat or saliva or skin cells and not the sex organ of Lewis? Was the second swab contaminated by DNA picked up on the rim of the anus before insertion?

Lewis is not advocating a reweighing of the evidence, rather, Lewis maintains that close scrutiny supports the finding that the evidence is lacking to support proof beyond a reasonable doubt. Where the evidence merely tends to support a conclusion of guilt, it is not enough to sustain the convictions on appeal. *Spears v. State*, 254 N.E. 2d 203 (Ind. 1970); *Bunting v. State*, 731 N.E. 2d 31 (Ind. App. 2000)(wherein conviction rests solely on speculation, reversal is required).

Because there is insufficient evidence to support Lewis' conviction for committing criminal deviate conduct, the life without parole sentence must be vacated.

II. IS THE WORD "SHALL" IN I.C. 35-50-2-9(g) A MANDATE TO TRIAL JUDGES OR DOES STATUTORY INTERPRETATION JURISPRUDENCE SUPPORT TREATING "SHALL" AS "MAY" IN LIGHT OF THE INTENT OF THE STATUTE?

A. The Trial Court's Interpretation of I.C. 35-50-2-9(g)

I.C. 35-50-2-9 governs the procedures for a trier of fact in considering whether to impose the two most severe sentences of death and life without parole. In today's case, the State filed two requests for life without parole. App. Vol. I, p. 45-46. Since the jury returned a verdict of not guilty

on the robbery charge, and guilty on murder and murder in the perpetration of criminal deviate conduct at the guilt phase, the second phase of the trial (consideration of life without parole) featured the request of life without parole based upon killing of the victim while committing criminal deviate conduct. The jury advised the court that it was hung on the issue of whether the State proved the aggravator beyond a reasonable doubt. Sentencing Tr. p. 1834-1837. By operation of the statute, the jury was discharged and the life without parole phase was presented to Judge Boswell. I. C. 35-50-2-9(f): "if a jury is unable to agree on a sentence recommendation after reasonable deliberation, the Court shall discharge the jury and proceed as if the hearing had been to the court alone".

The trial court found that the State proved beyond a reasonable doubt "that Robert Lewis III, intentionally killed Jennifer Kocsis while committing or attempting to commit Criminal Deviate Conduct". App. Vol. I, p. 209 ("Amended Order", emphasis supplied). Lewis argued that the court had discretion as to whether or not to impose life without parole or to impose a term of years:

MR. PAGE: Instead of imposing either the death sentence or life without the possibility of parole, even though the aggravating factors were found. Wilkes, as I said, clearly makes it clear that the Court consider these things.

Now, why if the -- why if the Court found those aggravating factors would they turn around and say, well, once the Judge made those factors, the Judge had no choice.

THE COURT: Well, no, no, no. It's clear that if they proved their aggravator and we find mitigators that outweigh the aggravator.

MR. PAGE: They you can --

THE COURT: Then I can do a term -- I can do a term of years.

MR. MARCUS: Correct, correct, that's a correct statement.

THE COURT: But we have one aggravator here and one mitigator here and that mitigator does not outweigh.

MR. PAGE: As I understand - - as your Honor has intimated. But the fact of the matter is that your Honor has taken a position that even if you find those two things to be true, you - - if you find - - you must. And my argument - - and this is obviously of great significance - - is that no, you are not required to. You clearly have the same option as the jury.

THE COURT: Okay. Mr. Page, we're going to proceed today and I'm going to interpret the statute the way I read it because I don't see where it says - - it clearly says the Court - - jury has three options, but when it lists what - - when you revert to the case as if it were tried to the Court, it does not list - - it does not say that the Court could find a term of years or life without parole.

MR. PAGE: So you'll be making it clear on the record that if you're imposing life, you're doing it because you believe the statute requires you to?

THE COURT: Well, I believe that they - - I believe that they proved their aggravator - -

MR. PAGE: Right.

THE COURT: (Continuing) - - that it was an intentional killing, and they proved it beyond a reasonable doubt, and that the one aggravator that has been suggested, and I don't have anymore to offer that you didn't bring up, that that one does not outweigh the aggravator.

MR. PAGE: And your Honor is then taking the position that because you find those things to be true, you must impose life.

THE COURT: Yes, that's what the - - that's how I read the statute, that I must impose the term of life without parole.

Sentencing Tr. p. 44-46.

B. Statutory Interpretation Jurisprudence Provides The Authority For Finding That A Trial Court Has Discretion In Determining Whether To Impose A Sentence Of Life Without Parole

When the word "shall" appears in a statute, it is construed as mandatory rather than merely directory or discretionary unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. *State ex rel. cit of Indianapolis v. Brennan*, 231 Ind.

492, 109 N.E. 2d 409. Our Supreme Court has interpreted a statute containing “shall” to be discretionary rather than mandatory. *Id.* In reviewing the statute in *Brennan*, our Supreme Court found that the act as a whole was intended to be remedial and that use of “shall” as a term of mandate was inconsistent with the statutes’ intent. *Id.*

Our Supreme Court’s examination of penal statutes requires when interpreting a statute that the language be constructed strictly against the State in favor of the accused. *Smith v. State*, 867 N.E. 2d 1286 (Ind. 2007). Finding that the word “shall” is directory in today’s case would satisfy this doctrine.

Lewis contends that interpretation of the word “shall” to mandate imposition of life without parole by Judge Boswell (and other similarly situated jurists in future cases) is inconsistent with the intent of I.C. 35-50-2-9 and of other penalty enhancement statutes. That is, a trial judge should be afforded discretion as to whether or not to impose life without parole. This Court has recognized the critical importance of the trial court having the three options of imposing death, life without parole, or a term of years in a case featuring the same sentencing procedural posture:

“There are, however, circumstances in which the trial judge exercises discretion over the sentence imposed. This occurs when judgment was entered on a guilty plea or after a bench trial, or when the court assumes control of sentencing after a jury is unable to agree on a recommendation after reasonable deliberation. Similarly, if the jury finds several aggravators, one or more of which is not supported by sufficient evidence, the trial court may balance the remaining aggravators and determine whether to impose a sentence of life without parole or a term of years...”

Pittman v. State, 885 N.E. 2d 1246 (Ind. 2008)(emphasis supplied).

Clearly, in *Pittman* our Supreme Court recognized the continuing discretion of the trial judge when a jury is discharged based on the jury’s inability to reach a sentence recommendation. It would be inconsistent with the intent of the statute in providing for jury discretion in such a significant

decision-making process of whether to impose death or life without parole, by removing a judge's discretion on the ultimate issue. Further, even after imposing life without parole, the court had authority to revisit the ruling had a motion to correct errors been filed asking for reconsideration and "13th juror" review.

Pittman and Harrison v. State, 644 N.E. 2d 1243 (Ind. 1995) provide support for Lewis' contention that Judge Boswell had the discretion to not impose life without parole based upon the requirement of the trial court to include in its sentencing order "the trial court's personal conclusion that the sentence was appropriate punishment for the offender and crime". *Pittman*, at 1252, (discussing the life without parole statute's requirements in *Harrison*). In today's case, the trial court did not include the court's personal conclusions that the life without parole sentence was appropriate, based upon the offender and the crime. To the contrary, the court clearly voiced the opinion that the court was imposing the sentence because the court read the statute as not giving the court discretion and thereby mandating the result. Sent. Tr. p. 44-46.

Support for Lewis' position is also found by consideration of lesser sentence enhancements which include discretion rather than requiring mandatory imposition. Hence, if discretion exists as to whether or not to impose lesser enhancements, logically, it should apply to the most severe enhancements. Due Process clearly requires such a result. U.S. Const. Art 5, 6, 14. I.C. 35-50-2-11 is the enhancement for "firearm used in commission of offense" and provides that the State may seek an enhancement for certain offenses where a defendant uses a firearm in the commission of an offense. The statute provides that the court may sentence the defendant to an additional five (5) years. Similarly, regarding Indiana's habitual offender statutes, which can add as many as thirty (30) additional years, our Supreme Court has held that the trier of fact has the discretion to not find a

defendant to be a habitual offender even when there is uncontroverted proof that a defendant qualifies as same. *Seay v. State*, 698 N.E. 2d 732 (Ind. 1998). Surely such discretion must extend to a more severe penalty.

Based upon these considerations, our Supreme Court should hold that the word “shall” is not a word of mandate in the statute and that it should be interpreted as discretionary only, thereby announcing that a trial court’s discretion is not usurped under I.C. 35-50-2-9.

III. THE TRIAL COURT’S SENTENCING ORDER IS INADEQUATE UNDER HARRISON AND PITTMAN

Pittman v. State, 885 N.E. 2d 1246 (Ind. 2008) teaches that the sentencing order requirements announced in *Harrison v. State*, 644 N.E. 2d 1243 (Ind. 1995) survive the 2002 amendment to I.C. 35-50-2-9 such as to apply to today’s case. Of great impact on the instant case is the requirement that the order must “set forth the trial Court’s personal conclusion that the sentence was appropriate punishment for the offender and crime”. 644 N.E. 2d at 1262. As discussed in Argument II above, rather than include a personal statement, the trial court explained that the court’s reading of I.C. 35-50-2-9 mandated imposition of a life sentence (certainly implying or leaving open the distinct possibility that discretion would result in a sentence of years). Significant “residual doubt”⁴ exists in the record. In the morning after reaching the verdicts at the guilt phase, but prior to the penalty phase, one of the jurors presented a note to the court explaining that he did not believe there was sufficient evidence to support the conviction but he was pressured into reaching the verdict. Tr. p. 1774. This factor should have been considered by the court. The trial court should have also

⁴ Based upon *Graham v. Florida*, trial court would have been encouraged to submit a survey of other murder cases from Lake County featuring LWOP aggravators that were not charged as LWOP cases to present a proportionally challenge this was not attempted.

considered the fact that the jury could not reach a verdict as to whether the State proved the aggravator beyond a reasonable doubt.

Wilkes v. State, 917 N.E. 2d 675 (Ind. 2009) revisited the impact of a jury's failure to reach a recommendation in the ultimate sentencing decision under I.C. 35-50-2-9. This Court held that after the 2002 amendment to the statute, the increased emphasis on the role of the jury merits the conclusion that the jury's inability is a factor the trial court should be permitted to consider because it "demonstrates a level of uncertainty among the citizens who considered the evidence as to the appropriate penalty" at p. 693. These two factors should have been considered in the court's calculus as to the sentence.

The order is further problematic because the State charged, and prosecuted Lewis for killing Kocsis while committing criminal deviate conduct, rather than under an attempt theory. The trial court's order reveals the court's finding that the State proved that Lewis "intentionally killed Jennifer Kocsis while committing or attempting to commit..." App. Vol. I, p. 209. Proof only as to an attempt is precluded by the charging information and jury instructions herein. The order is therefore vague as to whether the State met its burden of proof.

Based on the inadequate sentencing order, Lewis seeks the same relief granted in the life without parole case of *Dennis v. State*, 908 N.E. 2d 209 (Ind. 2009) wherein our Supreme Court found the sentencing order inadequate and revised the defendant's life sentence to a term of years rather than remanding the case.

IV. **THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF LEWIS' PAST CONDUCT**

A. **Rule 404(b) Precludes Admission Of Prior Bad Acts**

Over timely objections that evidence of Lewis' alleged past conduct after drinking alcohol was not relevant and went to his character and as such violated Evidence Rule 404(b), the trial court admitted the evidence based upon the State's urging that it was "habit" rather than 404(b) bad acts.

Rule 404(b) of the Rules of Evidence, provides that:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The State sought to introduce evidence of Lewis' behavior after drinking in the presence of Rebecca Hixon a year before the instant offenses. Tr. p. 198-203. Lewis objected based upon relevance and character ("trying to paint him as a bad man...") 200-202.

The State claimed that the evidence was admissible as habit and that the year old incident coupled with Lewis' behavior the night of the offense along with observation by other witnesses satisfies admissibly as habit. *Id.* Hixon observed Lewis in 2010, at a small gathering of her friends, "get up in her face and started yelling at her". Tr. p. 205.

The State also questioned Rodney Taylor, Lewis' friend and his ride to Pepe's on April 1, 2011, about Lewis' personality when drinking and the court admitted the following over timely (and continuing) objection:

A. He goes to like from like a nice guy to a meaner person I should say.

Tr. p. 1167.

The evidence herein reveals that Kocsis voluntarily left with Lewis and there was no proof that Lewis was angry or mean toward Kocsis while at Pepe's prior to leaving together. Accordingly, Lewis contends that the true purpose for the admissibility of this evidence was to show prior bad conduct to establish the "forbidden inference" that Rule 404 seeks to prohibit. *Cline v. State*, 726 N.E. 2d 1249 (Ind. 2000). This "propensity rule" forbids evidence offered for the sequence of inferences that one who committed a crime probably has a defect of character, and one who has such a character defect is more likely than others to have committed the crime in question. *Anderson v. State*, 681 N.E. 2d 703, 707 (Ind. 1997). The evidence of Lewis "getting in the face" of a female a year before April 1, 2011, and of becoming a "meaner" person in the past when he drinks, is commonly referred to as "extrinsic act evidence" - which is conduct other than at issue in the case at bar. *Gibbs v. State*, 538 N.E. 2d 937 (Ind. 1989). Rule 404(b) addresses any act which is not part of the charged offense, regardless of whether the other act was criminal. *Cadiz v. State*, 683 N.E. 2d 597 (Ind. App. 1997). The State clearly sought to "dirty up" Lewis in the minds of the jurors.

Today's case features a prime example of the unfair prejudice Lewis was subjected to by the extrinsic, uncharged acts: the jury will infer that Lewis is a bad person who should be punished for these other acts, and the jury will draw the forbidden inference that the defendant's character is flawed such that he had a propensity to engage in the type of conduct charged by the State, and that he acted in conformity with that character on April 2, 2011. *Williams v. State*, 677 N.E. 2d 1077 (Ind. App. 1997). Hence, the trial court erred in admitting this evidence. Ind. Evid. 404(b).

B. The Error In This Close Case Is Not Harmless

Having shown that the State's evidence is violative of Rule 404(b), the next inquiry is

whether the error was harmless. Because the proof of whether Lewis actually committed criminal deviate conduct is based upon the circumstantial DNA evidence, Lewis asserts that the improper evidence cannot be viewed as harmless as it goes directly to the issue of guilt and involves a substantial right, Ind. Evid. R. 103: (“Evidence may not be predicted upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...”). U.S. Const. Amend. 5, 6, 14; *In re Winship*, supra (proof beyond a reasonable doubt is required as to each element of the charged offense).

Lewis should be awarded a new trial due to the trial court’s erroneous admission of Rule 404(b) evidence which created the “forbidden inference”.

V. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE

In this case of circumstantial evidence, *Hampton v. State*, 961 N.E. 2d 480 (Ind. 2012) is controlling as to the law governing jury instructions. In *Hampton*, our Supreme Court held that DNA evidence with respect to murder and criminal deviate conduct charges, was circumstantial evidence of the defendant’s actus-reus of the offenses such as to warrant a “reasonable theory of innocence” instruction. This instruction would have had to be given in the instant case based upon the circumstantial DNA evidence.

Lewis acknowledges that he did not request a *Hampton* based jury instruction. However, Lewis asserts that the trial court had a duty to instruct the jury as to the “reasonable theory of innocence” triggered by the DNA circumstantial evidence, and failure to so instruct constitutes fundamental error.

The Supreme Court may resort to the fundamental error doctrine to address on direct appeal

an otherwise procedurally defaulted claim, but fundamental error review is available only where the record reveals a clearly blatant violation of basic and elementary principles where the potential for harm cannot be denied, and where the violation made a fair trial impossible *Jewell v. State*, 887 N.E. 2d 939 (Ind. 2008); *Maul v. State*, 731 N.E. 2d 438 (Ind. 2000).

Because the criminal deviate conduct charge was prosecuted exclusively on circumstantial DNA evidence (no witnesses to the offense), Lewis was entitled to the beneficial instruction announced in *Hampton v. State*, 961 N.E. 2d 480 (Ind. 2012). Specifically, Lewis was entitled to the following jury instruction: “In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence”. 961 N.E. 2d at 491.

As discussed above, the requirement that the State prove each and every element of a crime beyond a reasonable doubt is guaranteed to Lewis by the Due Process Clause of our federal constitution. *In re Winship*. The *Hampton* instruction is vital in a circumstantial evidence case to properly supplement the traditional reasonable doubt instruction.

Accordingly, this error impacts on a fundamental right of Lewis, and in this close case, since *Hampton* was controlling law at the time of this trial, all parties, including the court, were charged with knowledge of its holding. In this rare instance, Lewis urges that the trial court had a duty to correctly and fully instruct the jury as to the law and this failure to instruct should be deemed fundamental error, as the other instructions do not touch upon the law of circumstantial evidence and no instruction regarding circumstantial evidence was given. App. Vol I, p. 150-178.

VI. THE SENTENCE OF LIFE WITHOUT PAROLE IS INAPPROPRIATE IN LIGHT OF THE NATURE OF THE OFFENSE AND CHARACTER OF THE OFFENDER

Our state constitution provides that the Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed. Ind. Const. Art 7, Sec. 4. Rule 7(B) of the Rules of Appellate Procedure provides the standard of review when a defendant challenges a sentence: is the sentence inappropriate in light of the nature of the offense and character of the accused.

The killing of Jennifer Kocsis reflects a brutal, terrible beating. The cause of her death was manual strangulation and multiple blunt-force injuries. Tr. p. 693. Had this case prosecuted solely as a murder, the brutality would justify a sentence above the advisory term of fifty-five (55) years. Lewis asserts two arguments against this being a life without parole killing: (a) the circumstantial evidence does not support the finding that the killing was committed while in the perpetration of sexual deviate conduct; and (b) residual doubt⁵ is significant in the case based upon the note from juror 313 (identified as Black male) explaining that he was pressured into a verdict along with the inability of the jury to find that the aggravator was proven beyond a reasonable doubt. These are factors that militate against this case being a life without parole case. Finally, the trial judge did not include the requisite statement in the Sentencing Order that it is her personal conclusion that life without parole is the appropriate sentence for the offender and the crime, and vacating the life sentence would be the appropriate remedy as was done in *Dennis v. State*, 908 N.E. 2d 209 (Ind. 2009).

⁵ The concept of “residual doubt” recognizes that “when a jury finds a defendant guilty beyond a reasonable doubt there still may be a measure of residuum of doubt about the defendant’s guilt”. *Miller v. State*, 702 N.E. 2d 1053, 1069 (Ind. 1998).

Lewis respectfully suggests that these factors should now be considered by our Supreme Court in light of *Roper v. Simmons*, 543 U.S. 551 (2001) and *Graham v. Florida*, 130 S.Ct. 2011 (2010) and the emerging requirement that life without parole cases warrant their own category of federal Eighth Amendment scrutiny. That is, state court sentences that have Eighth Amendment impact will be reviewable by federal courts for proportionality⁶ and under evolving standards of decency. *Graham*. A sentence of life without parole says that the defendant's life is irredeemable, and not capable of reform. To this point, Lewis suggests that one of the most significant factors should be a defendant's criminal history. Is there a pattern of violent offenses or repetitive serious felonies that would support the irredeemable title? No, not in Lewis' history.

At the time of sentencing, Robert Lewis III, was 42 years old. Lewis had no felony convictions and six misdemeanor convictions: 1) carrying a handgun without a license; failure of duty; driving while suspended; reckless driving; a second driving while suspended; and intimidation. Additionally, Lewis had an open misdemeanor operating while intoxicated and driving while suspended case. App. Vol II, p. 229-230.

Lewis obtained a GED from the Gary Career Center after being expelled from high school for fighting. *Id.* p. 231. He has been a self-employed barber since 1999. *Id.* He regularly attends New Hope Church in Hammond, Indiana. Lewis was diagnosed with Bipolar Disorder while in custody in the Lake County Jail. Lewis admitted to a history of alcohol abuse and marijuana use. *Id.*

⁶ Pursuant to *Graham*, trial counsel had the opportunity to introduce other Lake County murder cases that could have been filed as LWOP cases but were not for proportionality review. This was not accomplished. Because appellate and trial counsel are members of the same public defender staff, ineffective assistance of counsel cannot be presented today.

Regretfully, we do not know more about Mr. Lewis because at sentencing, Lewis' trial counsel did not present any mitigating evidence except to argue that the State did not prove the killing was intentional beyond a reasonable doubt; and that criminal deviate conduct was not proven beyond a reasonable doubt. Tr. p. 1790-1803 (to the Jury) Sentencing Hearing Tr. p. 3-50 (to the Court).

Because this is a life without parole case, our Supreme Court must consider that this severe penalty is similar to the death penalty. Life without parole is like a death sentence with no execution date, and it is an irrevocable and permanent sentence because of no chance of parole. (See Berry, *More Different Than Life, Less Different Than Death*, Ohio State Law Journal, 2010). Both sentences are statements that an offender no longer possesses the ability to offer society any positive contributions and should therefore be isolated from society for the remainder of his days. Id.

Lewis contends that he is not irredeemable and that this case is closer in kind to the multitude of murder cases with sentences of years and the sentence of life without parole is not appropriate in this case. Our Supreme Court should revise Lewis' sentence to a term of years.

CONCLUSION

WHEREFORE, Appellate Robert Lewis III, respectfully prays for an Order: (a) finding that there was insufficient evidence to support Lewis' conviction for criminal deviate conduct (therefore requiring revision of the life without parole sentence); (b) holding that the trial court had the authority to impose a sentence of years under I.C. 35-50-2-9; and/or (c) a revision of Lewis' sentence such that life without parole is vacated and the Supreme Court shall impose a sentence of years; and for all just relief.

Respectfully submitted,

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