IN THE SUPREME COURT OF FLORIDA

DANIEL KARR JOHNSON,)
Appellant,)
vs.) CASE NO.: 61,937
STATE OF FLORIDA,)
Appellee.)

ANSWER BRIEF OF APPELLEE

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AMENDED TABLE OF CASES

OTHER AUTHORITY

STATEMENT OF THE CASE

Appellee hereby accepts Appellant's Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

With the following exceptions, Appellee hereby accepts Appellant's Statement of the Facts as presented in his initial brief. In addition, certain clarifications and restatements of facts will be included where relevant in argument.

1. On March 8, 1982, Appellant moved for a mistrial on the basis that he had been handcuffed in the presence of the jury immediately before the afternoon recess. (R 667) The motion was made and argument conducted in the chambers of the trial judge. Id.

The courtroom bailiff stated the handcuffing took place in the hallway outside the holding cell doorway, not in the courtroom. Id. He indicated that he had taken the precautions of having another bailiff stand behind him and had cuffed Appellant with his hands in front. The bailiff demonstrated for the court and stated "nobody could see what we were doing." Id. The prosecutor stated that he was there and did not observe the handcuffs being placed on Appellant.

Appellant stated that he observed a juror looking over as he was cuffed. (R 667-668) The trial judge denied the motion without questioning that, or any other juror. (R 668) Appellant did not request that the juror(s) be questioned.

2. The record does not reflect that a request for a jury instruction concerning territorial jurisdiction was made by the defense and denied. Appellant raised the issue pretrial in a one paragraph motion. (R32-33) The alleged failure was not raised pursuant to a motion for judgment of acquittal or motion for new trial. (R999-1001, 1003, 396-398).

3. Appellant did not object to the State's Requested Jury Instruction No. 1 on the grounds advanced in brief. (R 1005) (See Point III, infra.)

4. Appellant did not properly object to the testimony of Detective Newman concurring the statement given by Appellant at his arrest and booking procedures. (R 1088) Detective Newman testified that prior to the statement, Appellant had been fully advised of his constitutional rights and indicated that he understood. (R 1088, 514-516) (See Point V, infra.)

5. The record reflects that the trial judge considered all evidence presented in mitigation, not just the statutorily enumerated factors. (R 426, 444)

POINT I

APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TRIAL JUDGE'S DENIAL OF A MOTION FOR MISTRIAL WHERE INQUIRY INDICATED THAT APPELLANT WAS HANDCUFFED OUTSIDE THE HOLDING CELL AND NOT IN THE PRESENCE OF THE JURY

ARGUMENT

The argument under this point is premised upon the defendant's own allegation that an unnamed juror observed the bailiffs handcuff him following an afternoon recess. Trial counsel relayed this information to the judge by means of a motion for mistrial. (R 667-668) An inquiry was conducted in chambers whereupon the court concluded that a mistrial was not in order. (R 668) The State submits that the factual information adduced during this inquiry sufficiently repudiated Appellant's personal allegation so that an inquiry of the jury panel was unwarranted.

Upon questioning by the trial judge, the courtroom bailiff indicated that he had handcuffed Appellant, not in the courtroom, but in the hallway outside the holding cell. (R 667) The bailiff stated that the door to the courtroom was open; however, a second bailiff was standing behind him as he cuffed Appellant's hands in front of him. Id. It was the bailiff's opinion that he could not have been observed by anybody. Id. The prosecutor's personal observations supported this statement. Importantly nothing in the record indicates that even defense counsel observed the handcuffing of his client.

To have queried the jury concerning their observations would have focused attention on the incident, thereby prejudicing Appellant.

In Lakeside v. Oregon, 435 U.S. 33 (1978) Justice Stevens, in his dissenting opinion, noted that the giving of a curative instruction to disregard under some circumstances was like telling the jury "not to think of a white bear." Id. at 345. We submit this rationale is equally applicable under the instant circumstances.

In brief, Appellant has cited at length case law directed toward the fundamental precepts of due process, right to a fair trial and the presumption of innocence. The State does not dispute that an accused is entitled to all of the foregoing. Likewise, we do not quarrel with the authority cited by Appellant. We do submit, however, that these constitutional guarantees were not violated in the instant cause.

Appellant was not brought to trial in his prison garb, clothed as a convict or bound in chains. Shultz v. State, 131 Fla. 757, 179 So. 764 (1974); Estelle v. Williamson, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Appellant was not brought into the courtroom in handcuffs in the presence of the jury nor was he handcuffed and chained in their presence thereby depriving him of the presumption of innocence. Commonwealth v. Cruz, 226 Pa. 241, 311 A.2d 691 (1973); Walthall v. State, 505 S.W.2d 898 (Tex.Ct.Crim.App. 1974). Appellant's argument is eloquent, but we find it without merit under the instant factual circumstances. The case law cited is not analogous.

Further, we dispute Appellant's contention that "nothing in the record established Appellant as a security risk." (See, Appellant's brief, p.12.) The record reflects that the instant murder was committed in an attempt to avoid arrest while Appellant was under

sentence of imprisonment. Section 921.141(5)(a) and (e), Florida Statutes. State witness Randy Thomas testified that Appellant admitted killing the girl because "She said she was going to send me back." (R 881-884) If Appellant would commit murder to avoid violation of parole, it is not illogical to take security precautions such as handcuffing. In Elledge v. State, 408 So.2d 1021 (Fla.1981), the defendant appeared before the sentencing jury in leg irons. This Court determined that the trial court had not abused its discretion inasmuch as the defendant had confessed to the murder of three people and had threatened to attack a bailiff.

Federal case law requires that a defendant show prejudice caused by exposure to the jury in handcuffs or shackles. In United States v. Diecidue, 603 F.2d 535 (5th Cir.1979), the Fifth Circuit held that a mistrial was not in order where some of the defendants were seen in shackles by jurors or prospective jurors. The court deemed inadvertent exposure to jurors while in handcuffs was not so inherently prejudicial as to require a mistrial. Instead, the defendant bears the burden of affirmatively demonstrating prejudice. We respectfully submit Appellant has not met this burden. Here as in Diecidue, the condition under which Appellant may have been seen by one juror was a routine security measure rather than a situation of unusual restraint such as schackling of defendants during trial. Thus without a showing of actual prejudice, there this Court cannot assume error warranting reversal occurred. Id. at 549.

Declaration of a mistrial and discharging a jury should be exercised with great care and granted only in cases of absolute necessity. Perry v. State, 146 Fla. 187, 200 So. 525 (1941); Salvatore v. State,

366 So.2d 745 (Fla.1979). The trial court handled the matter properly and in an expedious manner. Appellant did not request that the jury panel be questioned. Therefore, he cannot now complain that such an inquiry did not take place. Appellant has failed to demonstrate an abuse of judicial discretion in the court's refusal to grant a mistrial under the instant facts. Accordingly, reversal for a new trial is not in order.

POINT II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT JURISDICTION MUST BE PROVEN BEYOND A REASONABLE DOUBT.

ARGUMENT

Appellant raised the question of territorial jurisdiction over the instant murder by means of a one paragraph pre-trial motion to dismiss. (R32-33) This motion, accompanied by Appellant's affidavit, simply stated that all elements of the offense were committed in Charlton County, Georgia. Id. The State traversed with the following factual information intended to be presented at trial:

> 1. The decedent, Jacqueline Propster, was last seen alive at approximately 2:30 A.M. on July 21, 1981, in Jacksonville, Duval County, Florida.
>
> 2. The body of the decedent was discovered on July 25, 1981, in Clay County, Florida, in the vicinity of Long Branch Road and McClellan Road.
>
> 3. A witness, Mrs. Bell,[1] states that she heard the sounds of a female screaming which emanated from the residence of Terry Johnson, the brother of the defendant, and the residence of the defendant on July 21, 1981.
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> 4. Mrs. Bell also states that the time of such screams was approximately 6:10 A.M., July 21, 1981, and that for the next ten to twenty minutes she observed no one leave the residence of Terry Johnson.

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[1] Ms. Bell did not appear at trial inasmuch as she had moved and was thus unavailable to the State as a witness.

5. A witness, Randy Thomas, states that at approximately 10:00 A.M., July 21, 1981, the defendant, Daniel Karr Johnson, arrived at his home and stated that he, the defendant, had just killed a girl and needed help in disposing of her automobile.

6. Randy Thomas states that he accompanied the defendant and assisted the defendant in his, the defendant's, unsuccessful attempt to burn the decedent's automobile.

7. Randy Thomas states that the defendant also told him that he, the defendant, killed the girl because she had "ripped off" the defendant. The defendant further stated that he killed the girl and left her body under an abandoned house in Clay County in the vicinity of Long Branch Road and McClellan Road.

8. Randy Thomas also states that the defendant described the way in which he killed the girl in that he strangled the girl with his hands in a field near the abandoned house then used a rope to make sure that she was dead.

9. The rope which was found about the neck of the decedent has been analyzed by experts from the Florida Department of Law Enforcement who state that the rope about the decedent's neck is in all ways similar in color, size, diameter, slit width, fiber type and construction to other pieces of rope recovered in the general vicinity of the decedent's body.

10. The medical examiner opines that the decedent died of asphyxia due to ligature strangulation.

(R34-35) Appellant's motion was denied by the trial court as legally insufficient (R481, 182).

Section 910.005(2), Florida Statutes provides that ". . . if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state." The body of Jacqueline Propster was discovered in the vicinity of Long Branch Road and McClellan Road in Clay County, Florida (R34, 758-759) Accordingly,

the statutory presumption would be sufficient to vest territorial jurisdiction in the State of Florida.

Appellant argues that such a presumption is rebuttable. Further, he maintains that sufficient rebuttable evidence was presented at trial and he was "entitled to have the jury instructed" that jurisdiction must be established beyond a reasonable doubt by the state. (See, Appellant's brief, p.14) Appellee agrees that the presumption of territorial jurisdiction may be rebutted. However we cannot agree with the remainder of Appellant's argument.

Firstly, the only evidence rebutting the situs of the murder was Appellant's statement of August 27, 1981, to Detective A. G. Newman. This information was introduced by the State through the testimony of Detective Newman. He testified that Appellant told him that he, the Appellant, killed the girl in Georgia and brought the body back to Florida. Appellant wanted the Federal Bureau of Investigation (FBI) to investigate the case rather than the Clay County Sheriff's Office. (R973) Specifically Appellant stated that he and the girl "shot up" drugs and afterwards drove into Georgia. (R978-979) Along the way, the two quarreled over cocaine Appellant believed the girl had stolen from his brother. During the argument Ms. Propster slapped Appellant and he choked her to death with his hands. (R979)

We submit that this statement is insufficient to rebut the statutory presumption inasmuch as it directly contradicts prior statements and the testimony of the state's witnesses, especially that of the medical examiner concerning the manner of death. Dr. Peter Lipkovic viewed the body at the scene and observed a length of black synthetic type rope tied twice around the young woman's neck and

knotted with a single knot at the left front of the neck. (R783-786) Following an autopsy, Dr. Lipkovic concluded that Mrs. Propster died of ligature strangulation. (R787) Manual strangulation as a cause of death was ruled out by the distribution of the internal injuries. (R787-790). Further, the injuries indicated that the woman was alive when the rope was tightened around her neck. (R789).

Most importantly, this statement by Appellant contradicts the four (4) other statements given by Appellant to the same detective concerning the manner of death. (R956; 962-964; 964-966; 967-972) None of Appellant's other "confessions" indicates that Jacqueline Propster was killed, or died, outside the State of Florida.

We respectfully submit that Appellant's allegation does not rise to the level of "rebuttal." The case upon which Appellant relies is not persuasive. In Lane v. State, 388 So.2d 1022 (Fla 1980) both the defendant's confession and the physical factual evidence indicated that the murder took place in Alabama. Not so in the instant cause, all physical evidence points to the fact that the murder occurred in Florida. Id. at 1023-1024.

Secondly, Appellant argues that he is entitled to a jury instruction yet nothing in the record indicates that such a request was made and denied. (R1004-1013); Lane v. State was discussed during the charge conference, but in a different context. (R1009-1011)

Appellant did not allege failure to prove jurisdiction in moving for a judgment of acquittal. (R999-1001, 1003) In addition, the failure to give a jury instruction of this nature was not a part of Appellant's motion for new trial. (R396-398, but see, paragraph no.1)

Therefore Appellant cannot now complain of the impropriety in the trial court's failure to give a jury instruction which he did not request. Castor v.State, 365 So.2d 701 (Fla. 1978); Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981). It is a well established principle of criminal law that an appellate court will not review issues raised for the first time on appeal. Castor v. State; State v. Barber, 301 So.2d 7 (Fla. 1974); State v. Jones, 204 So.2d 515 (Fla. 1967).

POINT III

THE GIVING OF A MODIFIED VERSION OF THE STATE'S REQUESTED JURY INSTRUCTION NO. 1, CONCERNING INCONSISTENT EXCULPATORY STATEMENTS, WAS NOT ERROR

ARGUMENT

In order to find the modified jury instruction improper this Court must conclude, as Appellant advocates, that the instruction created a mandatory or a conclusive presumption concerning an element of the offense of murder. This Court must also conclude that the issue was raised below. Contrary to appellant's assertions, the instant instruction was not a irrebuttable direction by the trial judge nor was it an impermissible judicial comment upon the evidence. We disagree with the arguments advanced and submit that the instruction as requested, and as modified, was proper.

The jury could review and consider all of the evidence and circumstances presented. If after such review Appellant's statements were deemed by the jury to be "inconsistent" and "exculpatory," the jury was instructed that the statements "can be used to affirmatvely show consciousness of guilty and unlawful intent." (R 337) emphasis added) There was no mandate or directive from the trial judge as Appellant implies. The record simply does not support such a contention. The facts of this cause were left for the jury to find and then to interpret at their discretion. Thus even though the instant instruction was not as eloquently or artfully phrased as the California[1]

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[1] 1 Cal. Jury Inst. Crim [CAL JIC] No. 2.03 at 26 (4th Ed.), Confessions of Guilty-Falsehood.

or federal[2] counterpart, it was nonetheless a permissive presumption or inference accord. Fitzgerald v. State, 339 So.2d 209, 211-212 (Fla. 1976) (involves statutory presumption). (See, Appellant's brief, pp. 20-22).

Inferences and presumptions are a staple of our adversary system of fact finding. The United States Supreme Court noted that the value of these devices and their validity under the Due Process Clause vary from case to case depending on the strength of the correction between the particular facts involved and the degree the factfinders freedom to independently access the evidence is curtailed. Ulster County Court v. Allen, 442 U.S. 140, 99 Sct 2213, 60 L.Ed2d777 (1979). Even so, the Court determined that the ultimate test of constitutional validity remained constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. Id. at 156, 791 citing In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368 (1970).

Here as in Ulster, the trial judge's instructions make it clear that the presumption was merely a part of the prosecutor's case, that it gave rise to a permissive inference available only upon certain conclusions at the jury's discretion. Further the inference could be ignored by the juror's even if there had been no affirmative proof offered by Appellant.

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2 I Devitt and Blackmar, Fed. Jury Practice and Instructions 615.12 at 406-407 (3d ed.) - Exculpatory Statements - later shown false.

Interestingly the objection entered at the trial charge conference was not premised on either ground raised in brief. The basis for counsel's objection before the trial court the same information was "covered under the jury instruction 2.04 in weighting the evidence. Also jury instruction 2.04(e) which is our page 16, and that would be prejudicial to the defendant." (R 1005) Counsel did not raise mandatory or conclusive presumptions nor did he argue that the instruction was a judicial comment on the evidence of the case. (R 1011) Appellant is attempting to raise distinctly differing grounds on appeal. Such a practice is in direct contravention of Florida law. North v. State, 65 So.2d 77 (Fla. 1953); Steinhorst v. State 412 So.2d 332 (Fla. 1982). We submit that the instant argument cannot be raised for the first time on appeal. See, Florida Rule of Criminal Procedure 3.390(d).

In modifying the state's requested instruction, the trial judge relied upon the case of State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1981). The pertinent portion of State v. Frazier is as follows:

> Moreover, even if, arguendo, one of Frazier's verions of the stabbing were to warrant a dismissal of the charge, a separate inconsistent, but not thoroughly exculpatory, version of the event is evidence of the falsity of the completely exculpatory statement, which not only justifies the rejection of the completely exculpatory statement, but can be used to affirmatively show consciousness of guilt and unlawful intent. United States v. Pistante, 453 F.2d 412 (9th Cir. 1971). See Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980).

Id. at 1089. Thus the instruction is premised upon a truthful statement of the law and is not an impermissible judicial comment upon the evidence. See also, Smith v. State, No. 57, 743 (Fla. October 28, 1982) [7 FLW 487].

When this alleged "comment" is viewed in light of the authority cited by Appellant, it is equally apparent that this instruction is not a comment upon the evidence. In Raulerson v. State, 102 So.2d 281 (Fla. 1958), two defendants and two accomplices were on trial for rape when the judge stated ". . .these people have been shown to be all acting in a conspiracy together." Id. at 284. In Flicker v. State, 374 So.2d 1141 (Fla. 5th DCA 1979), the defendant was theorized to have paid or otherwise procured four individuals to murder a woman. In overruling a hearsay objection at trial, the judge added:

> . . .The court will rule that sufficient evidence has been established to create a conspiracy between the defendant and the witness.

Id. at 1142. Compare also Beckham v. State, 209 So.2d 687 (Fla. 1968), and Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964).

In asmuch as these grounds were not raised before the trial court, we submit reversal in not in order.

POINT IV

THE TRIAL COURT DID NOT ERR IN CHARGING THE JURY THAT BURGLARY AND ROBBERY ARE PRIOR VIOLENT FELONIES PURSUANT TO SECTION 921.141(5)(b), FLORIDA STATUTES.

ARGUMENT

Appellant contends that the jury was improperly instructed during the penalty phase that his prior convictions were aggravating factors to be considered as robbery and burglary are not crimes involving the use or threat of violence. Appellant concedes that this court has recently concluded that unarmed robbery is sufficiently a crime of violence to satisfy Section 921.141(5)(b). Simmons v. State, No. 58,183 (Fla August 26, 1982) [7 FLW 368].

In Simmons an argument similar to Appellant's was advanced: that robbery was not a crime of violence. This Court reasoned:

> Such a crime has a confrontational element that sets it apart from mere larceny or stealing. The distinction is illustrated by the difference between a pickpocket, who does not intend to confront or assault his victim, and a purse-snatcher, who does. The law recognizes the serious nature of such a confrontational crime and classifies it as robbery because it has a high life-endangering potential. Through the assault or restraint, even if not physically injurious or violent, the robber conveys to the victim the message that is he resists, greater force will be used if necessary to effectuate the robbery. Therefore, a robbery committed by assault and restraint is just as much a felony involving the threat of violence as is a robbery committed through battery or the display of a weapon.
>
> We therefore conclude that, for the purposes of section 921.141(5)(b), Florida Statutes (1977), robbery is as a matter of law a felony involving the use or threat of violence. The trial court was correct in so instructing the jury and in finding this aggravating circumstance based on the evidence.

Id. at 369.

While conceeding the appropriateness of the robbery conviction, Appellant nevertheless argues the use of the separate burglary conviction was improper. Admittedly this Court did address the use of a prior burglary conviction as a prior felony involving violence in the recent case of Mann v. State, No. 60,569 (Fla September 2, 1982) [7 FLW 395]. However, Mann v. State does not support the conclusion Appellant advocates. In Mann, this Court held that a "prior conviction of a felony involving violence must be limited to one in which the judgment of conviction disclosed that it involved violence." Id. at 396. Upon evaluation, this Court concluded that Mann's Mississippi conviction for burglary was too vague to suffice as a crime of violence as a matter of law. However, this Court surmized that a conviction under the Florida burglary statute was deemed to adequately involve violence. Section 810.02(2)(a), Florida Statutes. See, Mann v. State at 396, n.4. Inasmuch as Appellant's conviction was for burglary of a dwelling, a second degree felony, he was presumably convicted under Section 810.02(3), Florida Statutes[3]. However the trial court and the sentencing jury did not have evidence of this conviction solely from the judgement and sentencing order.

Marion Wainwright, Clerk of the Circuit Court testified that Appellant was convicted of a two count information charging armed

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3 These judgment and sentence orders were introduced as State's Exhibit 27 and have been forwarded to this Court.

robbery and burglary of a dwelling. (R 1082) Various defense witnesses expressed knowledge of the armed robbery. (R 1111, 1117) Thus it would appear that there were persons present in the dwelling at the time of the burglary. Thus the "confrontational" argument articulated in Simmons should apply in the instant cause as well. See, Section 776.08, Florida Statutues.

Inasmuch as both the robbery and burglary convictions were proper, the remainder of Appellant's argument under this point is without merit.

Assuming arguendo that this court should conclude that the burglary conviction is not a violent crime, there was ample evidence to support factor in the robbery conviction alone. We therefore submit that error did not occur.

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POINT V

THE TESTIMONY CONCERNING APPELLANT'S CURRENT PAROLE STATUS WAS PROPERLY PRESENTED TO THE JURY DURING THE PENALTY PHASE OF APPELLANT'S TRIAL

At the penalty phase of Appellant's first degree murder trial, Detective A. G. Newman testified that during the arrest and booking procedures, Appellant discussed his "status relative to the Department of Corrections, the Parole and Probation Commission." (R 1088). Appellant stated that he was on parole for robbery. Id. Appellant conceeds that such information is a proper aggravating factor under Section 921.141(5)(a), Florida Statute; Lewis v. State, 398 So.2d 432 (Fla.1981). However, Appellant argues that while evidence on this factor was permissible during the penalty phase, the use of Appellant's admission to prove the factor was improper. In support of this position Appellant contends ". . .quite simply, there is nothing in the record to suggest that Detective Newman advised appellant of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) at the book-in desk when he asked appellant the question." (See, appellant's brief at p.29). Respectfully, this statement rejects the record.

Detective Newman testified that he advised Appellant of his constitutional rights. (R 1088, but see 1086-1089) Appellant's Counsel objected; he "reiterate[d] my objection I previously made not wanting to waive any statements made by Daniel Karr Johnson to law enforcement officers in violation to his constitutional rights." (R 1088) The objection was overruled. Id. Appellant's counsel did not cross-examine Detective Newman. Id.

The basis of Counsel's objection is unclear. Presumably the objection refers to his pretrial motion to suppress filed on March 5, 1981. (R 180-181) Paragraph number six of that motion seeks suppression of:

> 6. Any other statements made by the Defendant to any law enforcement agent.

(R 180) The motion was denied in part on that same date. (R 182) The trial court's Order indicates that paragraphs 3, 4, 5 and 6 were stipulated to by the parties. Id. The record contains two separate stipulations of fact: one dated March 5, 1982 and the other dated March 8, 1982. (R 310-312) Neither stipulation addresses statements given by Appellant to law enforcement officers at the time of booking procedures.

During the March 5, 1982 hearing on the motion to suppress, the instant statement was not addressed. (R 503-549) The defense focused on Appellant's written statement as well as the other oral statements given by Appellant. Indeed when questioned as to the allegations in paragraph 6, counsel responded: "Kind of anything else I didn't catch in the first five." (R 504)

At the suppression hearing, however, Detective Newman clearly indicated that a proper constitutional advisement had transpired, that Appellant acknowledged an understanding of those rights and had voluntarily provided subsequent information. (R 514-516) Appellant was "very alert and cognizant of everything that was going on around him." (R 516) We, therefore, query why Appellant ignores the existing advisement and raises the instant challenge to the statement concerning Appellant's status on parole.

The record does not reflect that the instant argument was advanced before, the trial court; therefore, it cannot be raised for the first time on appeal. Objections must be made, and made with specificity. Castor v. State; North v. State; Clark v. State, 363 So.2d 331 (Fla.1978); State v. Cumbie, 380 So.2d 1031 (Fla.1980); Kujawa v. State, 405 So.2d 251 (Fla. 3d DCA 1981).

POINT VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE ADVISORY SENTENCING JURY ON, NOR FINDING IN AGGRAVATION, THE STATUTORY FACTORS OF (1) AVOIDING LAWFUL ARREST; (2) HEINOUS, ATROCIOUS AND CRUEL; OR (3) COLD CALCULATED AND REMEDITATED

Appellant argues that the only evidence supporting the aggravating factors of avoiding or preventing lawful arrest, Section 921.141(5)(a), heinous, atrocious and cruel, Section 921.141(5)(h) and cold, calculated and premediated manner, Section 921.141(5)(i) came from his own statements and were therefore, suspect and unreliable. He argues that such evidence does not satisfy the "proof beyond a reasonable doubt" standard articulated by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973). A similar argument was advanced and rejected by this Court in Sireci v. State, 399 So.2d 964, 971 (Fla. 1981).

This Court has long held that findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial evidence to support those findings. See also, Hargrave v. State, 366 So.2d 1 (Fla. 1978) cert denied 444 U.S. 919 (1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979). We submit that substantial evidence did exist, in addition to and including Appellant's statements.

The medical examiner's testimony concerning the condition of the body and the manner of death are highly relevant. Moreover, Appellant's statements are not to be discounted on the ground that

Appellant advances. He is seeking to have this Court substitute its view of the evidence for the determination of the trier of fact. This Court has in the past declined to follow such a practice in reviewing capital cases. Quince v. State, 414 So.2d 185 (Fla. 1982); Brown V. Wainwright, 392 So.2d 1327 (Fla. 1981); Hargrave v. State. This Court is not to re-weigh or re-evaluate the evidence adduced to establish aggravating and mitigating circumstances. Jackson v. State, 366 So.2d 752 (Fla. 1978). Inasmuch as these are evidentiary matters, this Court has determined that its role is to determine whether there is sufficient competent evidence in the record from which the trial judge and the advisory sentencing jury could find the respective aggravating circumstances. Quince v. State at 187; Brown v. Wainwright at 1327. We respectfully submit that in the instant cause there is ample evidence to support the aggravating factors found by the trial court. (R 205-216)

Appellant's statements to Randy Thomas and to the authorities that he killed Jackie Propster in order to avoid being turned in for a robbery committed in South Florida is sufficient to justify the finding of Section 921.141(5)(e) as an aggravating factor. See, Alvord v. State, 322 So.2d 533, 538 (Fla. 1975). Admittedly under Riley v. State, 366 So.2d 19 (Fla. 1978), the mere fact of death, when the victim is not a law enforcement officer, is not enough to invoke this factor.

We also agree that proof of the requisite intent to avoid arrest must be very strong. In Riley, this Court concluded that the circumstance existed where the victim, who knew and could identify the defendant, was killed during a robbery. In Menendez v. State,

368 So.2d 1278, 1282 (Fla. 1979), this Court restated the requirement and noted that proof must clearly be shown that the dominant and only motive for the murder was the elimination of witnesses. See also, Menendez v. State, No.49,294 (Fla. August 26, 1982). [7FLW 371]. The aggravating factor was found in Meeks v. State, 339 So.2d 186 (Fla. 1976) where a robbery victim was killed immediately after the robbery in order to avoid identification. Accord, Magill v. State, 386 So.2d 1191 (Fla. 1980); Knight v. State, 338 So.2d 201 (Fla. 1976); Hoy v. State, 353 So.2d 826 (Fla. 1977); Washington v. State, 362 So.2d 658; Hargrave v. State, Jackson v. State, 366 So.2d 752 (Fla. 1970)

In brief, Appellant asserts that there is nothing in his statement to Randy Thomas to show that the woman was killed to prevent arrest for an outstanding warrant from Broward County. (See, Appellant's brief, p.32) We respectfully submit that the standard Appellant advances is too stringent and such specificity is not required. Appellant told Randy that the girl knew about the robbery in South Florida and was going to "send him back". The common sense interpretation is that Appellant, on parole and having committed a robbery for which he had not been charged, did not want to be sent back to the penitentiary. Randy Thomas testified that he immediately understood what Appellant meant upon uttering the statement. (R 882) It is not too much to assume that the jury and the court also understood.

The instruction on of heinous, atrocious and cruel was proper in that the evidence showed that the victim suffered greatly before and

at the time of her death. (R 893) This factor may be properly shown where fear and emotional strain precede death, even where death is almost instantaneous. Knight v. State, 338 So.2d 201 (Fla. 1976). In Alvord v. State, this Court found this factor where each of these murders was committed through strangulation by rope. Such action, this Court opined, could only be accomplished through a cold, calculated design to kill Id. at 540. There can be little doubt that such a "design" existed here were Appellant tried to strangle the victim twice with his hands before getting the rope. (R 893)

In conclusion, we submit that Appellant's argument pursuant to Woodson v. North Carolina, 428 U.S. 280 (1976) has been repudiated by the recent case of Gray v. Lucas, F.2d 444 (5th Cir. 1982). See also, Jent v. State, 408 So.2d 1024 (Fla. 1981).

POINT VII

THE TRIAL COURT DID NOT IMPROPERLY DOUBLE THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDIATED

ARGUMENT

The question of whether a murder is committed in a premediated manner does not relate to whether it is heinous, atrocious or cruel. Each factor is a wholly independent question to be determined by the trial judge. Menendez v. State, 368 So.2d 1278 (Fla. 1979) Cooper v. State, 336 So.2d 1133 (Fla. 1976) Appellant maintains that the trial court's findings regarding each circumstance are identical. (R 427) We find this argument unpersuasive.

The fact that Appellant twice tried to strangle the victim before success on this third attempt reflects the physical trauma and stress the young woman experienced before her death as well the cognition of impending death and consequently her fear and distress. Knight v. State.

Likewise the two attempts prior to the successful third attempt indicates the determination on the part of Appellant to effectuate the murder. It is evidence that the homicide was committed in a cold, calculated, and premediated manner without any pretense of moral or legal justification. Alvord v. State.

The aggravating factor of cold, calculated and premediated was added to Section 921.141(5), by the Florida Legislature and became effective July 3, 1979. Combs v. State, 403 So.2d 418, 421 (Fla.1981) cert. denied 102 S.Ct 2258 (1982). The provision was

intended to distinguish between "premeditated" illegal homicides and those which as might arise from a domestic dispute, a love triangle or other spontaneous killing. See, Halliwell v. State, 323 So.2d 557 So.2d 557 (Fla.1975); Hawthorne v. State, 377 So.2d 780 (Fla.1st DCA 1979); Taylor v. State, 294 So.2d 648 (Fla.1974). This Court has deemed that the addition of the factor limits the aggravating circumstances to the benefit of the defendant. Combs at 421; McCray v. State, 416 So.2d 804 (Fla.1982); Jent v. State, at 1032. (Fla.1981).

We submit that the record in the instant cause is dispositive. The instant factual circumstances more than adequately demonstrate that Appellant acted in a "cold, calculated manner" and "without any pretense of moral or legal justification." Section 932.141(5)(e); Jent v. State at 1032; Smith v. State, No. 57,743 (Fla.October 28, 1982) [7 FLW 487, 490]. Premediation may properly be relied upon as an aggravating factor under the instant facts.

We further submit that the instant factors were not improperly doubted. Appellant's argument ignores the fact that the instant record supports a finding of both aggravating circumstances.

Alternatively, should this Court find merit in Appellant's argument, the death penalty is proper inasmuch as there were no mitigating factors found in this cause. Hargrave v. State; Jent v. State; Brown v. State, 381 So.2d 690 (Fla. 1981); Jackson v. State, 359 So.2d 1190 (Fla. 1978); Gibson v. State, 351 So.2d 948 (Fla. 1977). Under such circumstances, the death penalty is presumed correct. Foster v. State, 369 So.2d 928 (Fla. 1979)

cert. denied 444 U.S. 885; Alford v. State, 307 So.2d 433 (Fla. 1975).

POINT VIII

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND NON-STATUTORY MITIGATING FACTORS

The trial court found no factors in mitigation of the instant murder. (R 426) Appellant argues that the Court expressly stated "that only statutory mitigating factors have been considered." (See, Appellant's brief, p.34) We disagree.

The Sentencing Order specifically states that "all testimony and evidence heard by the Court at both the guilt and penalty phases of the trial . . . matters presented in open Court by the defendant in rebuttal and in mitigation . . ." were considered (R 426). The Order further indicates that careful examination had been made of the testimony, evidence and arguments heard in the penalty phase and the presentence investigation report. Id.

The court failed, in the written order, to find the presence of statutory mitigating factors. Id. Thus, Appellant claims error. However Jacobs v. State, 396 So.2d 713 (Fla. 1981) requires only the consideration of any and all mitigating factors. There can be no violation in the instant cause for all factors presented were considered by the trial judge. Appellant would have this Court believe that the Court restricted its consideration to only the statutorily enumerated mitigating factors in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, ___US___, 71 L.Ed.2d 1 (1982).

The record does not support Appellant's argument. Unlike Eddings v. Oklahoma, there is nothing in the instant sentencing order which reflects a belief on the part of the trial judge that

non-statutory factors could not be considered. Moreover, the oral pronouncement of sentence clearly reflects that everything was considered, but nothing was found to mitigate Appellant's murder of Jacqueline Propster. (R 444)

The only factor presented in mitigation which could arguably be non-statutory was certain testimony addressed to Appellant's character, especially his lack of violence. We submit that this testimony may arguably be classed under Section 921.141(6)(a) for the defense witnesses testified to Appellant's alleged lack of a violent background and how the instant offense was out of character for the young man with whom they were acquainted. The testimony would thus be a statutory enumerated factor.

However even if this court should conclude that this evidence is strictly "character" as alleged in brief, Florida law does not restrict consideration of any evidence relevant to character. See Section 921.141(1). Therefore this Court must presume, in the absence of evidence to the contrary, that the trial judge followed the appropriate fact finding procedures. Harris v. Rivera, ___U.S.___, 70 L.Ed.2d 530 (1981) The judge simply did not find this evidence to mitigate the murder of Jacqueline Propster. (R 444) Such a determination violates neither Eddings v. Oklahoma nor Lockett v. Ohio. Accordingly this Court need not vacate the sentence of death and remand for resentencing.

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Appellee, the State of Florida, respectfully requests that this Honorable Court affirm the ruling of the trial court affirming Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to P. Douglas Brinkmyer, Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 19th day of November, 1982.

Barbara Ann Butler
Assistant Attorney General

BAB/cma/cb
(O&P)