IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 62,1[illegible]

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

AUTHORITIES CITED

AUTHORITIES CONTINUED

AUTHORITIES CONTINUED

AUTHORITIES CONTINUED

AUTHORITIES CONTINUED

AUTHORITIES CONTINUED

AUTHORITIES CONTINUED

AUTHORITIES CONTINUED

OTHER AUTHORITIES

POINT ONE

THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW BY THIS COURT IN THAT THE RECONSTRUCTION OF THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE IS RELIABLE AND COMPLETE.

It is well settled that "while it is clear that an indigent is entitled to a free transcript on appeal, Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the state is not obligated to automatically supply a complete verbatim transcript. Draper v. Washington, 372 U.S. 487, 495-496, 83 S.Ct. 774, 779, 9 L.Ed. 2d 899 (1963).

Rule 9.200(b)(3), Florida Rules of Appellate Procedure provides that:

> (3) If no report of the proceedings was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days of service. Thereafter, the statement and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

This procedure was utilized in the instant case to supply the missing part of the penalty phase involving the prosecutor's

closing argument. The trial judge under Rule 9.200(b)(3), Florida Rules of Appellate Procedure, is the final arbiter charged with settling and approving any reconstruction of the trial proceedings. The trial judge herein approved the reconstruction of the prosecutor's closing arguments during the penalty phase; and as such, are not subject to dispute.

The central issue that this court should consider, is whether or not the record on appeal is missing critical portions. The appellee submits that it does not.

The matters pointed out by appellant that were allegedly missing from the reconstruction are not critical portions of the record. Whether the prosecutor told the jury to not have mercy on Mr. Craig is not critical to the record on appeal. Nevertheless, appellee submits that this is part of the record (See RR-62). (See R-1759). Nor is it that the prosecutor quoted the scriptures to the jury. Mr. Fox, counsel for appellant, also quoted the scripture-- "Thou shalt not kill" -- to the jury during the penalty phase (See R-1760). In Paramore v. State, 229 So.2d 855 (Fla. 1969), this court held that:

> "The reading of passages from the Bible is not ground for reversal. Counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the case."

Id. at 860-861.

None of the above mentioned omissions are critical

to the record on appeal in that these acts or statements do not specifically relate to the statement of judicial acts to be reviewed. (See R,2123-2127). Under Florida law, an indigent defendant is entitled at state expense to only those portions of the transcript which relate to the assignments of error [statement of judicial acts to be reviewed] filed with the trial court. Cueni v. State, 303 So.2d 411 (Fla. 1st DCA 1974), cert. den. 310 So.2d 738 (Fla. 1975), cert. den. 423 U.S. 837, 96 S. Ct. 64, 46 L.Ed. 2d 56 (1975). See also, In re Rule 9.140, 376 So.2d 844 (Fla. 1979).

Appellant's reliance upon Peri v. State, 426 So.2d 1021, 1027 (Fla. 3d DCA 1983) is misplaced. In Peri, the trial judge was absent during voir dire. In the case sub judice, the trial judge was present at all times. Therefore, the trial judge in the instant case could rule on the reliability of reconstructed records, and the sufficiency of affidavits to the contrary.

Furthermore, appellant's reliance upon United States v. Selva, 559 F.2d 1303 (5th Cir. 1977) is also misplaced. Unlike in United States v. Selva, closing argument of defense counsel was recorded and made a part of the record. In Selva, the record contained no transcript of the closing arguments made by the defense or the government counsel at trial. In Selva, the court reporter became ill, and eventually incapacitated to the extent that he was unable to transcribe stenographically counsel's closing arguments. The reporter attempted, with the aid of a tape recorder, to preserve the arguments

but the machine malfunctioned and no record was made. In Selva, unlike in this case, the trial court concluded that it was not possible to reconstruct a substantially verbatim account of the final arguments, and declined to grant Selva a new trial.

Appellee submits that the fact that defense counsel's arguments were transcribed, taken together with the reconstructed record, sufficiently apprises this court of the substance of the prosecutor's closing argument. Although counsel for appellant herein did not defend appellant at trial, counsel has had the benefit of consulting with trial counsel regarding the reconstruction of the record (See RR-38). Appellee maintains that in the instant case, this court can readily determine from the balance of the record whether an error has been made in the untranscribed, but reconstructed portion of the proceedings.

In United States v. Selva, the Court clearly stated that:

> "We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions from the transcript."

Id. 559 F.2d 1306

Appellee contends that inasmuch as the transcript of the trial is complete, and that the penalty phase is complete [with the addition of the reconstructed arguments of the prosecutor], this court should determine that no substantial rights of

the appellant have been adversely affected by any of the omission or alleged irregularities advanced in appellant's brief. None of the alleged improper remarks were sufficient to work a reversal of the judgment and sentence herein. Compare Paramore v. State, 229 So.2d 855 (Fla. 1969) (reading scripture was not error; Darden v. State, 329 So.2d 287, 289 (Fla. 1976) (calling defendant "a vicious animal"--fair comment on evidence).

Appellee would point out that under Florida's new sentencing procedures the jury's sentencing determination is advisory only. The trial judge imposes the sentence. Part of the trial judge's function is to guard against any improper emotional impact on the determination of the sentence and to assure that the sentence imposed is based upon objective evaluation of the crime and the offender. The jury in the instant case was obviously capable of doing this inasmuch as they recommended life as to Count I. (See R-2088,2110).

The trial judge in the instant case made specific findings that:

> A. The prosecutor (Mr. Brown) in his Phase II argument at the trial did, on several occasions, point to the defendant, but in so doing, never approached closer than fifteen to twenty-five feet of the defendant and the "pointing" was in the manner usually exercised by both prosecutors and defense attorneys in trials and was never done in an improper, unseemly or threatening manner.
>
> B. That the tone and volume of the prosecutor's (Mr. Brown's) voice, while emphatic, was never improper,

unseemly or overly loud.

C. That the prosecutor (Mr. Brown) did not refer to the defendant as the devil and the former co-defendant as an angel. The reference by the defendant, and his several relatives filing affidavits in support thereof, could only have been to Mr. Brown's remarks in explanation of why the State of Florida entered into a negotiated plea with the former co-defendant of the defendant Craig. The court recalled this with a high degree of clarity inasmuch as the court was very interested in how the State would approach this issue inasmuch as the issue had been raised by the defendant in the defense of his case. The court recalled and found that the remarks made by the prosecutor (Mr. Brown) was that the former co-defendant was "no angel" but that he was the "lesser of the two evils" and that was why the State had entered into a negotiated plea with him. (See RR-147).

D. The court did not observe any action, behavior or argument by the prosecutor (Mr. Brown) which was improper or unseemly and specifically found that Mr. Brown did not exhibit any theatrical or exaggerated dramatic behavior. In so finding the court noted that the trial, by its very nature, and by the nature of the crimes charged, was permeated by emotion and drama but not beyond that which accompanies any trial involving murder in the first degree (RR-148).

The trial judge pointed out several objections made by defendant's trial counsel made in objection to the prosecutor's remarks (RR-13,148).

The instant case is totally unlike the situation

in Wester v. State, 368 So.2d 938 (Fla. 3d DCA 1979), wherein the entire transcript of trial was unavailable, and reconstruction was not insufficient for review of the points raised by appellant on appeal. That is not the case sub judice. Likewise, this case is entirely different than that in Delap v. State, 350 So.2d 462 (Fla. 1977), wherein the transcript of the jury charge conferences, charge to the jury in both the trial and penalty phases, voir dire of the jury, and closing arguments of counsel in both the trial and penalty phases were unavailable and incapable of reconstruction.

The failure of attorneys for parties to agree on a statement of the record after reporter's notes of testimony and criminal trial proceedings were lost does not require that the accused be granted a new trial [new penalty hearing] where the trial judge, on the basis of his recollection, restored the record with regard to areas in which counsel were not in agreement. See Carter v. State, 334 So.2d 109 (Fla. 3d DCA 1976).

Appellee respectfully submits that the record herein is complete and reliable, and that there are no missing portions of the record that could substantially affect this court's review of the judgment and sentence herein. Appellee further submits that the trial court has accurately reconstructed the proceedings that were missing, which was his duty under Rule 9.200(b)(3), Florida Rules of Appellate Procedure. Appellee submits that his findings and reconstruction of the record are entitled to a presumption of correctness, and that a new penalty hearing

is unnecessary. Carter v. State, supra.

POINT TWO

THE TRIAL COURT DID NOT ERR IN ADMITTING THE PHYSICAL EVIDENCE OBTAINED AS A RESULT OF THE SUPPRESSED CONFESSION, IN THAT THE PHYSICAL EVIDENCE WOULD HAVE BEEN DISCOVERED INDEPENDENTLY OF THE CONFESSION.

Appellant argues that the police could not have learned of where the bodies had been disposed without his involuntary statement. The Appellee, the State of Florida, strongly disagrees with appellant's argument. Appellee would maintain that the bodies of Mr. Eubanks and Mr. Farmer would have been discovered otherwise through ordinary police investigation (R, 2840-2846).

The exclusionary rule bars evidentiary "fruit" obtained "as a direct result" of an illegal search or an illegal coercive interrogation. Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407,416, 9 L.Ed.2d 441 (1963). Accord, United States v. Cruz, 581 F.2d 535, 537, 5th Cir. (1978)(en banc). Its bar only extends from the "tree" to the "fruit," however, if the fruit is sufficiently connected to the illegal tree:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would have not come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means

sufficiently distinguishable to
be purged of the primary taint."

Wong Sun v. United States, 371 U.S. at 487-88, 83 S.Ct. at 417, quoting R. Maguire, "Evidence of Guilt", 221 (1959).

One form of insufficient connection between fruit and tree occurs if physical evidence, a witness's testimony, or the accused's statement, has an attenuated link to the illegally secured evidence. Nardone v. United States, 308 U.S. 338,341, 60 S.Ct. 266,267, 84 L.Ed. 307 (1939); United States v. Cruz, 581 F.2d at 538. Another type of inadequate connection arises if the derivative evidence has an independent source from the illegally taken objects or statements. Silverthorne Lumber Company v. United States, 251 U.S. 385,392, 40 S.Ct. 182,183, 64 L.Ed. 319 (1920); United States v. Houltin, 566 So.2d 1027, 1031 (5th Cir.), cert. denied, 439 U.S. 826, 99 S.Ct. 97, 58 L.Ed.2d 118 (1978). A third category of insufficient connection obtains if the derivative evidence, [the bodies of Eubanks and Farmer], would inevitably have been discovered during a police investigation without the aid of the illegally obtained evidence [Craig's confession]. See United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980). The appellee maintains that the physical evidence was properly admitted under the inevitable discovery exception to the exclusionary rule.

In United States v. Brookins, the Fifth Circuit stated that like other circuits that have adopted the rule, we do not require absolute inevitability of discovery but simply a reasonable probability that the evidence in question would have been discovered other than by the tainted source. 614 F.2d at 1042, n. 2. In the instant case, the prosecutor demonstrated

that the leads, which made discovery inevitable, were possessed by the police and were being actively pursued by the police prior to the occurrence of the illegal conduct. Sheriff Adams, Sheriff of Sumter County, testified at the suppression hearing that he had contacted the sheriff of Hernando County for assistance, specifically to use their helicopter for aerial surveillance of the pits and the surrounding area of Sumterville (R 2840). Sheriff Adams testified that he had planned a ground search involving deputies in the area immediately around Sumterville. Wall Sink is within the area that they were going to search by air and ground (R 2840-2841). He testified that the decision to search by air and ground was made prior to Mr. Craig's leading investigators to the bodies (R 2841). Sheriff Adams further testified unequivocably that he felt "there is no doubt in my mind that we would have recovered the bodies." He further estimated they could have been found within two to three days (R 2842). Although there are six to seven sinkholes within a twenty mile radius of Sumterville, none were as large as Wall Sink (R 2843). Sheriff Adams felt that because of the physical evidence that he personally observed at Wall Sink, that the search would have been concentrated, based upon his experience, in that area. Specifically, Sheriff Adams noted that the physical evidence around Wall Sink indicated that something that bled had been dragged and thrown into the sink (R 2845). He testified that there were drag marks, particles of hay, and particles of thread fiber; there were drag marks going down the bank, and hay which was of a like material or plant growth that

he had seen on two different occasions the day before at the crime scene (R 2845).

Additionally, the appellee would point out that the statement from Mr. Schmidt's attorney, Mr. Roebuck, that the police had a lead that indicated that the bodies were in water and not to be easily discovered. They knew of Mr. Schmidt's statement prior to the appellant's confession (R 899).

The appellee maintains, that the prosecution demonstrated a reasonable probability that the police would have uncovered the derivative evidence apart from the illegal actions.

> [T]he exclusionary rule does not come into play merely because the proffered evidence is in fact the product of an illegal act. If. . . the illegal act merely contributed to the discovery of the allegedly tainted information and. . .such information would have been acquired lawfully even if the illegal act had never transpired, the presumption is removed, and the apparently poisoned fruit is made whole. In other words, if. . .the illegal act was not an indispensable cause of the discovery of the proffered evidence, the exclusionary rule does not apply.

Maguire, "How to Unpoison the Fruit--The Fourth Amendment and The Exclusionary Rule," 55 J.Crim.L., Criminology & Police Sci. 307,313 (1964). Accord, United States ex rel. Owens v. Twomey, 508 F.2d 858,865-66 (7th Cir. 1974).

The Supreme Court recently has suggested this exception to the exclusionary rule in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). In that case, the police violated the right to counsel of an accused murderer by eliciting incriminatory statements and then the location of the victim's body, after the accused had terminated interrogation

until he reached his lawyer. The Court sustained exclusion of the incriminatory statements themselves, but suggested that admission of the location and condition of the victim's body might be proper "on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited." Id. at 406 N. 12, 97 S.Ct. at 1243. See also, Killough v. United States, 119 U.S. App. D.C. 10,15, 336 F.2d 929,934 (D.C. Cir. 1964).

Two decisions of the Fifth Circuit have applied the principles on which this exception rests but in a slightly different context. In Gissendanner v. Wainwright, 482 F.2d 1293 (5th Cir. 1973), an illegally obtained confession provided the identities of two accused rapists and accounted for their presence in a line-up identification. The line-up and subsequent convictions were valid, however, because the rapists' identities would probably have been discovered subsequently during ordinary investigations.

> Certainly, before any consequences so destructive of society's right to be protected from violent crimes is to be set in motion, there would have to be a respectable showing that (i) it was solely through such invalid source that identity was ascertained and (ii) there was no likelihood that it would have subsequently been discovered through other police efforts.
>
> In summary, there is no showing on this record. . .that in the normal police work investigation their identities would not have turned up.

Id. at 1297 (emphasis added).

The court in Gissendanner, thus admitted evidentiary fruit that had a reasonable probability of subsequent discovery through "normal police work investigation."

Similarly, in Harlow v. United States, 301 F.2d 361 (5th Cir.), cert. denied, 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed.2d 56 (1962), an illegal interception of mail contributed to the disclosure of McLane's identity and lead to his interrogation about a bribery conspiracy. His ensuing confession and disclosures were the basis for a search warrant for incriminating letters implicating Harlow and Wilson. The confession and disclosures were not excluded however, both because independent leads (the independent source rule) also lead to the interrogation of McLane, and because his confession and disclosure had a reasonable probability of occurrence otherwise (the inevitable discovery rule).

This Court should apply the inevitable discovery rule to the instant case to find that the trial court properly admitted the evidence of Eubanks' and Farmer's bodies found at Wall Sink. First, the Supreme Court suggested an unlimited inevitable discovery rationale for admitting tainted evidentiary fruit in Brewer v. Williams, 430 U.S. at 406 n.12, 97 S.Ct. at 1243.

Second, Supreme Court decisions reject earlier statements that portray the exclusion of illegally obtained evidence as constitutionally required and make clear that the exclusionary rule reduces to a "judicially created remedy" to be applied only when it advances its judicial purpose. United

States v. Calandra, 414 U.S. 338,348, 94 S.Ct. 613,620, 38 L.Ed. 2d 561 (1974).

In the fourth amendment context, the "single and distinct" purpose for the exclusionary rule is deterrence of police violations of that constitutional protection against unreasonable searches and seizures. Tehan v. United States ex rel. Shott, 382 U.S. 406,413, 86 S.Ct. 459,463, 15 L.Ed.2d 453 (1966). Accord, United States v. Janis, 428 U.S. 446, 96 S.Ct. 3021,3028, 49 L.Ed. 2d 1046 (1976). In the fifth and sixth amendment context, the "prime purpose" of the exclusionary rule as applied to the fruits of police illegality is deterrence of government denial of the self-incrimination privilege or the counsel right United States v. Calandra, 414 U.S. at 347, 94 S.Ct. at 619; but a secondary purpose is ensuring the trustworthiness of incriminating statements, Michigan v. Tucker, 417 U.S. 433,446-48, 94 S.Ct. 2357,2364-66, 41 L.Ed.2d 182 (1974).[1] The attenuated connection exception and the independent source exception are justified because it is unlikely that suppression of attenuated or independently discovered derivative evidence would deter police misconduct and would bar untrustworthy evidence. E.g., United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). This justification also applies to the inevitable discovery exception.

---

[1]"Judicial integrity" is no longer regarded as an independent purpose or rationale of the exclusionary rule. Michigan v. Tucker, 417 U.S. 433,450 n. 25, 94 S.Ct. 2357,2367, 41 L.Ed.2d 182 (1974).

The trustworthiness purpose is served only slightly by exclusion of the inevitably discovered fruits of illegal searches or interrogations, because probable subsequent discovery of that same evidence ensures its trustworthiness and permits counsel for the government and for the accused to corroborate or disprove that derivative evidence. The deterrent impact and trustworthiness effect from excluding inevitably discovered evidence must be balanced against the State's interest in enforcing the criminal laws and protecting society from criminals. Stone v. Powell, 428 U.S. 465,487, 96 S.Ct. 3037,3049, 49 L.Ed.2d 1067 (1976); United States v. Janis, 428 U.S. at 453-54, 96 S.Ct. at 3031-3032. "[T]he application of the [exclusionary rule] has been restricted to those areas where its remedial objectives are thought most efficaciously served." United States v. Calandra, 414 U.S. at 348, 94 S.Ct. at 620. Accord, Stone v. Powell, 428 U.S. at 486-87, 96 S.Ct. at 3048,49. The harm resulting from exclusion of relevant and reliable evidence that the prosecution would probably have had despite the police misconduct outweighs the slight deterrence and trustworthiness produced by suppression of inevitably discovered evidence. United States v. Brookins, 614 F.2d at 1048.

As pointed out in United States v. Brookins, this approach does not mean that any illegally obtained evidence can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused had challenged the admissibility of the discovery of the bodies at Wall Sink,

the prosecution demonstrated that the police possessed and were actively pursuing leads that would have lead to the discovery of the challenged evidence, prior to Mr. Craig's confession, and there was a reasonable probability that the bodies would have thereby been discovered. This Court must find that a reasonable probability of subsequent discovery existed based on this showing and the record generally. Sheriff Adams' testimony proves that the prosecution would have discovered, in a lawful manner, had the prior illegality not occurred, by virtue of ordinary investigation of evidence or leads already in their possession, the bodies of Eubanks and Farmer. Therefore, the fruits of Craig's statements, the discovery of the bodies, which would otherwise have been inevitably discovered, need not be suppressed.

POINT THREE

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION IN LIMINE AND MOTION FOR MISTRIAL AND ALLOWING EVIDENCE OF COLLATERAL CRIMES.

Contrary to appellant's argument, the trial court did not deny appellant his constitutional right to a fair trial. Appellant points out that of the 808 pages of trial testimony, only ninety of those pages dealt with this issue. Appellant argues that the State never filed a notice of intent to offer this type of evidence under Section 90.404(2), Florida Statutes (1981). However, the appellee would point out that appellant did not object to this evidence on these bases in the trial court below. "Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." State v. Jones, 377 So.2d 1163 (Fla. 1979); State v. Barber, 301 So.2d 7 (Fla. 1974). Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. Steinhorst v. State, 412 So.2d 332,338 (Fla. 1982). Appellant did not object to this evidence based upon the State's failure to comply with Section 90.404(2), Florida Statutes (1981), therefore, this argument is waived. See Herzog v. State, Case No. 61,513 (Fla. Sup. Ct. September 22, 1983) [8 FLW 383].

The test for admissiblity of collateral offenses is relevancy, not necessity. Hall v. State, 403 So.2d 1321 (Fla.

1981); Ruffin v. State, 397 So.2d 277,278 (Fla. 1981). The State initially has the burden, if evidence of a collateral crime is to be admitted, of offering proof of a connection between appellant and the collateral offense. See State v. Norris, 168 So.2d 541 (Fla. 1964). Sub judice, the State presented evidence that appellant and Robert Schmidt sold in excess of eighty head of cattle between January, 1981 and July, 1981, for a sum in excess of $18,000 (R 787-823). The evidence clearly shows that appellant made all arrangements for the sale of the cattle, and that the cattle thefts were part of a prolonged crime spree. Accordingly, the evidence of the cattle thefts was admissible because it established the entire context out of which the criminal conduct arose. Hall, supra; Ruffin, supra. In a case of this kind, it was inevitable that certain facts tending to show the defendant's overall involvement in criminal activity (cattle theft) would come before the jury. Such evidence is admissible to illuminate the entire context out of which the defendant's criminal conduct arose. Smith v. State, 365 So.2d 704 (Fla. 1978) cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). In this case, the defendant's continued theft of Mr. Eubanks' cattle was so pervasive and so integral to the commission of the crime charged, that it could not be completely kept from the jury. Mr. Craig's central motive for killing Mr. Eubanks was to prevent detection of his theft of the cattle. In the instant case, it is impossible to give a complete or intelligent account of the

crime charged without referring to the other crime. Wilson v. State, 134 Fla. 199, 183 So. 748,751 (1938); Tompkins v. State, 386 So.2d 597 (Fla. 5th DCA 1980).

It is well settled that the Williams rule is not a rule of exclusion, but rather a rule of admissibility. In Williams v. State, 110 So.2d 654 (Fla. 1959), the Supreme Court made it quite clear that evidence of other crimes is admissible if such evidence is relevant to prove any fact in issue other than the bad character of the accused or his propensity to commit criminal acts. It is clearly established that it was necessary to introduce the evidence of the cattle theft to explain appellant's motive for killing his employer, Mr. Eubanks. Appellee maintains that counsel for appellant below did not adequately object to the introduction of these collateral offenses. He attempted to object by entering a standing objection, which did not argue the grounds raised by appellant before this Court. As appellant points out in his brief, an objection as to relevancy was overruled and a motion for mistrial based upon not necessarily just the evidence of the collateral crime, but what happened with the proceeds of the sale of the cattle, was entered by counsel for the appellant and was denied (R 929-930). Appellant now argues that this evidence was inadmissible because of the State's failure to comply with Section 90.404(2), Florida Statutes (1981). This ground was never asserted in the trial court. Appellee would submit that the rule requiring a contemporaneous objection at trial under such circumstances is firmly established.

Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978); Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980). Appellant has not argued that the admission of the evidence in question constituted fundamental error, and appellee would point out that such is not the case. Accordingly, this issue is not preserved for appellate review.

Appellant further maintains that when the appellant took the stand to testify, the prosecutor repeatedly asked appellant questions concerning his involvement in cattle rustling. However, upon advice of counsel, appellant invoked his rights under the Fifth Amendment. Appellant now maintains that the prosectuor's questions and subsequent closing argument that appellant failed to reveal all of his wrongdoings to the jury constituted a comment on the appellant's exercise of his constitutional right to remain silent. Appellant further maintains this served to magnify the error in allowing collateral crimes to become a feature of the trial. The appellee would strongly disagree with the appellant's argument in that when a criminal trial defendant testifies, his credibility can be tested in the same manner as with other witnesses. See Lebowitz v. State, 313 So.2d 473 (Fla. 3d DCA 1975); and Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980); and Section 90.08 Fla. Stat. (1977). Obviously, evidence of other crimes invariably serves to detract from the defendant's character and tends to establish a propensity toward criminality. Nonetheless, our courts have permitted such evidence to be introduced if it meets the test of relevancy.

Had the evidence of the defendant's cattle rustling been wholly unrelated to the murder charges, such evidence would not have been admissible under the rule of relevancy. However, such is not the case.

Appellant further maintains that although it was not requested, that a limiting instruction on the purpose of the introduction of this type of evidence should have been given. Pickles v. State, 291 So.2d 100 (Fla. 3d DCA 1974). Appellant maintains that as a result of this omission, the jury was never informed as to the permissible scope of consideration for such evidence. The appellee would point out that there is no error in failing to give the limiting instruction on the purpose of the introduction of this type of evidence because it was not requested. See Milton v. State, Case No. 82-1722 (Fla. 3d DCA October 4, 1983) [8 FLW 2466].

The evidence of the cattle thefts committed by the appellant and Robert Schmidt was but a chain of chronological events which began in January, 1981, with the first theft and sale of the cattle, and ended with the termination of the lives of John Eubanks and Bobby Farmer on July 21, 1981. The testimony regarding the cattle thefts was admitted without contemporaneous objection, and on this record, the admissibility of the testimony is not a proper issue for this Court's consideration, inasmuch as it is not preserved for appellate review. Herzog v. State, supra.

POINT FOUR

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL MADE DURING THE PROSECUTOR'S CLOSING ARGUMENT TO THE JURY IN THE GUILT PHASE.

At the outset, with all due respect to opposing counsel, appellee is unable to see a scintilla of mert in this point. The prosecutor, during closing argument in the guilt phase, went through the possible argument that counsel for Robert Schmidt could have made, had appellant been offered a plea bargain instead of his co-defendant, Schmidt. There was no objection made to this argument before the jury.

Additionally, appellant sets forth five other allegedly improper comments, which also were not objected to (See Appellant's brief, p. 37). Appellant continues in allegations number eight, nine, ten, twelve and thirteen, to cite to alleged acts of misconduct on behalf of the prosecution. Appellant never objected to what he perceived as acts of misconduct. Accordingly, appellee submits that these matters are not preserved for appellate review. Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Cumbie, 380 so.2d 1031 (Fla. 1980).

Appellant did object to two instances of alleged misconduct. In allegation number seven, defense counsel objected to what he perceived as a misstatement of the law of principals, and not to any implication that the prosecutor was making about defense counsel (R 1620). With reference to allegation number eleven, counsel for appellant did object and move for a mistrial

on the basis of the prosecutor's reference to his client's testimony as lying (R 1642). The motion for mistrial made at that time attempted to cover "other matters" that were argued in closing argument; however, such an objection is insufficient to preserve any objections to "other matters" excluding the comment on Mr. Craig's veracity.

With respect to any misstatement of the law regarding principals, the appellee submits that the trial court cured any impropriety by stating:

> [THE COURT]: I think it will suffice to say, the Court will instruct you as to the law as soon as the attorneys have finished their argument. If the attorneys misstate the law, you will be able to understand from the court's instruction what law to apply to the evidence as you find it. (R 1620-1621)

With respect to the prosecutor's comment on the truth or credibility of Mr. Craig's testimony, the trial court correctly denied defense counsel's motion for mistrial, inasmuch as the prosecutor's remarks were fair comment on the evidence and the credibility of the witness.

In Magill v. State, 386 So.2d 1188,1189 (Fla. 1980), this Court refused to find reversible error in an allegation relating to an alleged misstatement concerning the function of the jury made by the State at voir dire, noting that subsequent instructions by the court had cured any misstatement. Appellee would suggest that the matter regarding any misstatement on the law of principals as alleged by appellant, would be resolved accordingly.

With respect to appellant's objection to the prosecutor's comments referring to appellant as a liar, the appellee would maintain that the trial court's ruling that the comment on the credibility of the witnesses was fair comment, and that defense counsel could cover it on rebuttal, was not error. A mistrial should be declared for prejudicial error which will vitiate the trial's result. Perry v. State, 146 Fla. 187, 200 So. 525 (1941). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. Id. Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such an instruction would be unavailing. The comments that were objected to by counsel for appellant were not so objectionable that an instruction would be unavailing. The trial court's comments that he would instruct the jury on the law, and that the attorney's argument was not the law, was sufficient to cure any prejudice.

Wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments, Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of this discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d

751 (1972). See generally, Breedlove v. State, 413 So.2d 1,8 (Fla. 1982).

Appellee would take exception to appellant's argument that the prosecutor commented on defense counsel or defense tactics. With regards to the allegation that the prosecutor implied that defense counsel, by his objection, somehow did not want the jury to know about the law on principles, appellee would submit that is a misstatement of defense counsel's objection (R 1620). Defense counsel objected on the basis that the prosecutor's comments were a misstatement of the law. There is nothing in the record to indicate that the prosecutor's remarks were a comment on the defense counsel's tactics. The other allegation regarding defense counsel's ability to "twist" or bully and confuse the State's witness, Robert Schmidt, was unobjected to at trial. Even if appellant's characterization of the prosecutor's remarks were correct, and appellee would not so concede, they hardly rise to the level of those in Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982).

Appellee submits that the absence of objections to the alleged prejudicial comments by the prosecutor precludes appellate review. Clark, supra; Cumbie, supra, Steinhorst, supra. The appellant has failed to demonstrate reversible error as to this point.

POINT FIVE

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE MAXIMUM AND MINIMUM PUNISHMENTS FOR THE LESSER-INCLUDED OFFENSES.

The record does not substantiate appellant's argument with regards to this point. There is no objection to the instruction on lesser-included penalties by Mr. Fox, counsel for appellant below (R 1521-1522). The record indicates that the following occurred:

> MR. FOX: I don't know that I requested anything other than the maximum and minimum of first degree.
>
> MR. BROWN: I think if you give maximum and minimum of one, you've got to give it for all of them.
>
> THE COURT: Yes, it would be awfully inconsistent. (R 1521)
>
> There might be intimidation on the part of the Court as to what they should find if I simply give it as to one and not as to the other.
>
> MR. FOX: I hate to cite the old case, but apparently failure to give it on the lesser-included is not reversible error, so I take the contrary of that.
>
> THE COURT: Giving it, it is.
>
> MR. FOX: No, I'm not going that far, I'm not requesting anything further than minimum and maximum as to the offenses charged. (R 1522)

Appellee submits that the above colloquy does not

indicate that Mr. Fox objected to the trial court's instruction on maximum/minimum penalties for the lesser-included offenses, but simply that he was not requesting it (R 1522).

Appellant contends that if the defendant is not entitled to a jury instruction on the penalties for lesser-included offenses, then neither is the State. The appellee is well aware that the trial judge is not obligated under the rule to inform the jury of punishment for each of the lesser-included offenses other than the offense charged, however, there is no prohibition against the court informing the jury of the penalties for the lesser-included offenses. Settle v. State, 288 So.2d 511 (Fla. 2d DCA 1974); Mitchell v. State, 304 So.2d 466 (Fla. 3d DCA 1974); and James v. State, 393 So.2d 1138 (Fla. 3d DCA 1981); McGough v. State, 407 So.2d 622 (Fla. 5th DCA 1981). Although there is no requirement in the law that a trial judge instruct the jury as to the penalty for a lesser-included offense, there is no prohibition against such an instruction. Id. In Tascano v. State, 393 So.2d 540 (Fla. 1980), the Supreme Court held that it is mandatory that an instruction be given on the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused has been on trial. The appellee would maintain that there is no proscription in Tascano against the trial judge giving the maximum and minimum penalties for lesser-included offenses.

The appellee maintains that the appellant's argument is without merit and not preserved for appellate review. Castor v. State, 365 So.2d 701 (Fla. 1978).

Additionally, appellant's argument ignores the possibility that the instruction on the maximum and minimum penalty for the lesser-included offenses, enhanced the defendant/appellant's chances of receiving a "jury pardon." Furthermore, the trial judge instructed the jurors that the determination of the extent of punishment rests solely within the discretion of the trial judge, and not the jury. Accordingly, the trial court did not commit reversible error in charging the jury as to the maximum and minimum penalties for lesser-included offenses.

POINT SIX

THE TRIAL COURT DID NOT ERR IN ALLOWING THE MEDICAL EXAMINER TO TESTIFY, DURING THE PENALTY PHASE, THAT THE MURDERS WERE, IN HIS OPINION, EXECUTION-STYLE KILLINGS.

The appellee would point out that the testimony objected to occurred during the penalty phase. Appellant's guilt had previously been determined during the guilt phase. Therefore, at the outset, appellee submits that if the trial court erred, it was harmless. Harmless error is a viable concept in a capital appeal and has been applied by this Court in select instances. See Johnson v. State, 393 So.2d 1069 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980); Odom v. State, 403 So.2d 936 (Fla. 1981).

The trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and, unless there is a clear showing of error, its decision will not be disturbed on appeal. Johnson, supra, at 1072. The common thread running through all the decisions dealing with the admissibility of expert testimony is the premise that if the disputed issue is beyond the ordinary understanding of the jury, such testimony is admissible. Id. Unquestionably, Dr. Wilson is an expert in the field of pathology and medicine. Mr. Fox, defense counsel below, stipulated to his expertise (R 1708). Nevertheless, he felt that Dr. Wilson was not an expert in the field of executions, and would object to his giving an

opinion regarding the question of whether, in fact, the killings were execution-style. It is important to note that the doctor gave his opinion from the prospective of the manner in which the victim, John Smith Eubanks, was shot. Specifically, the doctor mentioned that his idea of what an execution-style killing would entail could include being shot from the back (R 1711). The doctor also stated that he would classify the second shot to the head of Mr. Eubanks as an extra, probably fatal wound (R 1712). With regards to Mr. Farmer, Dr. Wilson testified as to certain defense wounds Mr. Farmer had sustained (R 1713). Defense counsel did not object to this testimony. Certainly, if Dr. Wilson could testify in reference to whether an injury was sustained in a defense posture or not, he is certainly capable of discerning whether or not a certain injury was inflicted execution-style. In Palmes v. State, 397 So.2d 648 (Fla. 1981), this Court recognized that a judgment will not be reversed unless the error committed was prejudicial to the substantial rights of the appellant; such prejudice will not be presumed. See also Salvatore v. State, 366 So.2d 745 (Fla. 1978). The appellee submits that Dr. Wilson's testimony did not substantially prejudice the rights of the appellant. The appellee further submits that the manner in which a wound is inflicted is not within the ordinary understanding of the laymen, and therefore, was proper opinion testimony.

POINT SEVEN

THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT IN THE PENALTY PHASE DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND 12 OF THE FLORIDA CONSTITUTION.

The trial court, during the reconstruction of the prosecutor's closing argument, specifically recalled that the prosecutor did refer to the defendant as a cold-blooded, calculating murder and questioned the reliability of the defendant as a witness, pointing out that the defendant had taken the stand to testify during the guilt phase and that his testimony was materially contradicted by other testimony and evidence. At the time the prosecutor made this remark, the jury had already convicted the defendant of two counts of first degree murder. Therefore, the court found nothing improper about the argument or the manner in which it was delivered (RR 148).

Appellee would maintain that the prosecutor did not express his personal opinion about a matter in issue (RR 165). His expression of awareness of the burdensome duty of the jury was not improper, but merely an expression of his knowledge of the burden the State had placed upon the jury (RR 165); and a reminder of their oaths as jurors. Clearly, those remarks were not so inflammatory or prejudicial as to vitiate the entire trial.

In Paramore v. State, 229 So.2d 855,858 (Fla. 1969), an earlier capital case, this Court held that it would not be presumed that a jury would be led astray to wrongful verdicts by the impassioned eloquence and illogical pathos of counsel. The

appellee submits that the jury's advisory verdict of a life sentence as to count I, for the murder of John Smith Eubanks, clearly and substantially demonstrates the accuracy of this court's reasoning in Paramore.

In Darden v. State, 329 So.2d 287,289 (Fla. 1976), this Court recognized that improper remarks by a prosecutor only entitles a defendant to a new trial in an instance in which it is reasonably evident that the remarks made might have influenced the jury to return a more severe verdict of guilt than would have occurred otherwise; even in evaluating inflammatory and abusive arguments by the State, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements were made. Id. at 291.

Additionally, appellee would contend that the prosecutor's references as to the role of the jury have not been found to be objectionable. See Breedlove v. State, 413 So.2d 1 (Fla. 1982). Additionally, comment on the lack of remorse during the penalty phase has been found not to lead to a tainted recommendation by the jury. Riley v. State, 413 So.2d 1173,1175 (Fla. 1982); Sireci v. State, 399 So.2d 964 (Fla. 1981). Sentencing procedures have changed since Pait v. State, 112 So.2d 380 (Fla. 1959). The reasoned judgment of a sentencing judge now lies between the advisory verdict of an inflammed or quiescent jury and the rendition of a death sentence. Alvord v. State, 322 So.2d 533,540 (Fla. 1975); State v. Dixon, supra. The judge's findings of fact and reconstruction of the record are entitled to a presumption of correctness. This Court should affirm the judgment

and sentence of the trial court. Tibbs v. State, 397 So.2d 1120 (Fla. 1981) affirmed, 454 U.S. 1122, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). (See also argument in Point One infra).

POINT EIGHT

THE TRIAL COURT DID NOT ERR IN UTILIZING THE VOTE TALLY AND OTHER FINDINGS, TO ARRIVE AT A JUSTIFICATION FOR IMPOSITION OF THE DEATH PENALTY AS TO COUNT I.

The appellee submits that if any error occurred, then it was invited. Counsel for appellant participated in drafting the verdict forms, and the form submitted did not allow for the vote tally with regard to a recommendation of life imprisonment, but only with regard to the imposition of the death penalty (R 2015-2016).

The alleged "error" was not contemplated by the court in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The trial court disclosed the vote tally for count I and therefore, appellant was fully apprised of all the information the court utilized to make its decision. Compare, Harvard v. State, 375 So.2d 833 (Fla. 1979); and Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983). (See also Point IX C.5. infra).

POINT NINE

THE SENTENCES OF DEATH IMPOSED UPON APPELLANT ARE BASED UPON APPROPRIATE AGGRAVATING CIRCUMSTANCES WHICH ARE NOT OUTWEIGHED BY SUFFICIENT MITIGATING CIRCUMSTANCES.

In the instant case, as to Count I, the trial court overrode the jury's life recommendation. The trial court found three (3) aggravating circumstances, and one (1) mitigating circumstance (R 2089).

In evaluating the propriety of a death sentence after a jury recommendation of life, this Court must decide whether the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Under the totality of the evidence presented by the facts in this case, this Court should conclude that under the circumstances, the sentence of death as to Count I was justified. See White v. State, 403 So.2d 331 (Fla. 1981).

A. THE TRIAL COURT DID NOT IMPROPERLY CONSIDER THE WEIGHT TO BE GIVEN THE JURY'S RECOMMENDATION.

1. THE JURY'S LIFE RECOMMENDATION (COUNT I).

Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision of

whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed. 2d 265 (1978). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973). In the case sub judice the trial court properly found three (3) aggravating circumstances with the only mitigating circumstance being that at the time of the conviction he had no significant history of prior criminal activity (R 2089). This factor alone does not outweigh the enormity of the aggravating facts, especially in light of the court's finding based on testimony that the appellant engaged in ongoing and systematic theft and conversion of some eighteen thousand dollars worth of the victim's cattle from his ranch; that the murder had been planned by the appellant for months prior to its commission down to each trivial detail, i.e. how to prevent the body of the victim from being found; how and where to hide the victim's vehicle; when and where the shooting was to occur and how the victim was to be lured to the secluded spot from which there would be no help or escape from death. Further, the victim was shot twice in the back of the head causing massive damage to his brain in execution-style murder. Immediately after the victim was gunned down the appellant robbed his body. The appellant subsequently weighted the body down with concrete blocks, disposing of it in a deep water filled pit (R,2092-2098).

The appellant attempted to prove in mitigation under Section 921.141(6)(b), that he was under the influence of extreme mental or emotional disturbance at the time the crimes were committed. The trial judge properly rejected this mitigating circumstance. The judge noted in his findings of fact that the record was entirely devoid of any evidence of such a condition from either psychiatric, psychological, or competent lay witnesses, except for the self-serving declaration of such a condition by the appellant, which was materially inconsistent with all the other evidence in the case and is totally unsupported. The court also noted that the careful planning and deliberate execution of the murder and methodical attempt to rob the victim's body and dispose of the body and the victim's vehicle and a faint attempt at assisting in the search for the victim conclusively demonstrated that the appellant was in full possession of his normal faculties at the time of the murder. There was no basis for the jury recommendation of life imprisonment under this particular circumstance (R 2098). See McRae v. State, 395 So.2d 1145 (Fla. 1980).

The appellant also failed to prove in mitigation that he was not an accomplice in the murder of Eubanks, which offense was committed by another person with the appellant's participation being relatively minor. In this regard, the court noted in its findings that the appellant was involved in a scheme of systematic cattle thieving from the victim. The principle motive for the murder of the victim was the desire by the appellant to

avoid liability for his past cattle theft and to facilitate the continued operation of his scheme of systematic theft. The court found that although the evidence did not show that the appellant's hand held the firearm which was the immediate cause of the victim's death, the evidence did establish that the murder was envisioned, carefully planned and refined by the appellant, and that the appellant furnished to Robert Schmidt the three rounds of ammunition to be used in the murder. This theory was properly rejected by the trial judge in weighing the evidence produced at the trial. The jury had previously settled the question of appellant's guilt by their verdict of guilty.

> A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Buford v. State, 403 So.2d 943, 953 (Fla. 1981).

In White v. State, 403 So.2d 331 (Fla. 1981), the death penalty was held to be properly imposed upon a defendant who was not a trigger man despite the fact that the get-away driver did not receive the death sentence. A jury recommendation based on this mitigating circumstance would have no reasonable basis under the facts of the instant case.

In view of the fact that the cattle theft scheme

was created and run by the appellant and that such scheme led to the subsequent murder of the victim, the appellant's contention that he acted under the substantial domination of another person is not supported by the evidence. Moreover, the court noted that appellant was the foreman of the ranch and had the power to hire and fire Robert Schmidt, whom the appellant was allegedly substantially dominated by (R 2099). The jury recommendation based upon these mitigating circumstances would be unfounded in the instant case.

The court also found that the appellant possessed a high degree of acuity and criminal intelligence as evidenced by his methodical and detailed planning and execution of the murder (R 2101). Prior decisions of this court have held, in similar situations that the ages of twenty-three, twenty-two and eighteen years were not mitigating circumstances where the facts established that the age of the defendant was not a factor in the crime in any substantial or material respect. See Washington v. State, 362 So.2d 658 (Fla. 1978); Songer v. State, 322 So.2d 481 (Fla. 1975); Goode v. State, 365 So.2d 381 (Fla. 1978); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Ruffin v. State, 397 So.2d 277 (Fla. 1981). The State would conclude that the jury recommendation of life imprisonment has no reasonable basis under the circumstances of this cause.

2. THE JURY DEATH RECOMMENDATION (COUNT II).

With respect to Count II the jury recommended that the court impose the death penalty upon appellant. Appellant

argued with respect to Count I, that the jury's recommendation of life was entitled to great weight. Tedder, supra; Hawkins v. State, 436 So.2d 44 (Fla. 1983).

Now, appellant argues, that the jury's recommendation as to Count II, is not entitled to great weight because the sentencing recommendation is unreliable since it "could be based upon inflammatory argument to the jury by the prosecutor." Appellant's contention is highly illusory and suppositious; and devoid of merit. Should this Court assume that the jury's recommendation of life was based upon the defense counsel's impassioned argument?

The argument raised by the appellant was not an issue in Teffeteller v. State, Case No. 60,337 (Fla.Sup.Ct. August 25,1983), or Elledge v. State, 346 So.2d 998 (Fla. 1977).

Additionally, appellant contends that the trial judge gave undue consideration to the jury's recommendation of death. Clearly, the trial court's decision did not give undue consideration to the jury's recommendation. (See Penalty Proceeding Findings of Fact R 2090-2091). At no time did the trial court find that it was bound to recommend the death sentence due to the jury's vote, contrary to the court in Ross v. State, 386 So.2d 1191 (Fla. 1980). Therefore, the rationale of the court in Ross is inapplicable.

B. NO MITIGATING FACTORS, STATUTORY OR NON-STATUTORY, WERE PRESENT WHICH OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES.

1. History of Prior Criminal Activity.

The appellant claims no significant history of prior criminal activity. §921.141(6)(a), Fla.Stat. (1981). The trial court found this mitigating circumstance present as to the murder of Eubanks since Craig had no previous trouble with the law. However, the trial judge rejected this factor when considering the sentence as to Count II on the basis of the contemporaneous conviction of Count I. This contemporaneous criminal activity was properly considered to negate the mitigating circumstance of no significant history of prior criminal activity.

This Court in Elledge v. State, 346 So.2d 998 (Fla. 1977), recognized the purpose for considering prior criminal conduct in the capital sentencing process is to ensure a proper character analysis to determine if the ultimate penalty of death should be imposed. Specifically, this court stated:

> [W]e believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.

346 So.2d at 1001.

In McCrae v. State, 395 So.2d 1145, 1154 (Fla. 1981), this Court determined that the word "convicted" as used in section 921.141(5)(b) means "a valid guilty plea or jury

verdict of guilty for a violent felony; an adjudication of guilt is not necessary for such a 'conviction' to be considered in the capital sentencing character analysis."

In Ruffin v. State, 397 So.2d 277 (Fla. 1981) the appellant contended that the trial court reversibly erred in failing to consider and to weigh the mitigating circumstance of no significant history of prior criminal activity. The State, during closing argument in the sentencing phase of the trial, urged the jury and judge to consider Ruffin's murder of Deputy Coburn as significant prior criminal activity. Ruffin contended that it was improper to consider this criminal conduct because it occurred during the same criminal episode and after the murder for which he was being tried. The State responded that this criminal activity was properly considered to negate the mitigating circumstance of no significant history of prior criminal activity.

This Court found that "the fact that a defendant has been found guilty by a jury and adjudicated guilty by the trial court of such violent crimes is material to this character analysis. Id. at 397 So.2d at 283.

This Court concluded in Ruffin:

> We hold that in determining the existence or absence of the mitigating circumstances of significant prior criminal activity, "prior" means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced. The interpretation of "prior" advanced by Ruffin is unreasonable

> particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

397 So.2d at 283.

It is clear from prior cases, therefore, that contemporaneous or subsequent crimes occurring during the same criminal epsiode may preclude finding the mitigating circumstance of having no significant history of prior criminal activity.

Menendez v. State, 419 So.2d 312 (Fla. 1982) cited by the appellant involved a felony murder conviction in which there was no direct evidence of premediated murder as there was in the instant case. Lewis v. State, 377 So.2d 640 (Fla. 1980) involved the state's cross-examination of a witness as to whether he had heard of the defendant having shot someone prior to the murder and is not really applicable to the case sub judice.

2. THE DEFENDANT'S PARTICIPATION WAS MAJOR AND THE DEFENDANT WAS NOT UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER.

Notwithstanding the fact that appellant was not the trigger man when Eubanks was killed, he was present in

the Hammock, and did yell to Robert Schmidt (co-defendant) and began to empty his pistol into Bobby Farmer, which signaled Schmidt to shoot Eubanks (although not prearranged).

This clearly supports the conclusion that appellant masterminded the murder of John Smith Eubanks. Robert Lawrence Schmidt worked under Craig as a part-time laborer at the victim's ranch. The appellant was the foreman at the Eubanks' ranch and hired Schmidt as a part-time laborer. Shortly after Schmidt began to work under Craig, Craig solicited Schmidt's participation in his ongoing systematic theft and conversion of some eighteen thousand dollars worth of the victim's cattle from Eubanks' ranch. Schmidt further testified that the defendant had personally arranged for the theft, transportation and sale of the said cattle and would then distribute, on each occasion, the illegal proceeds from the theft on an unequal basis between himself and Schmidt with the larger share of the proceeds going to the defendant. Schmidt further testified that Craig told him on several occasions prior to the murder that if John Smith Eubanks were to be killed by the defendant that Eubanks' widow, knowing nothing of the operation of the ranch, would be totally dependent upon the defendant as foreman, and that the defendant could then bleed off, sell and illegally convert to his profit the entire calf crop and the other major assets of the ranch, without anyone knowing. Schmidt further testified that at the actual time of the murder of John Smith Eubanks, the defendant, Craig, rifled a wallet off of the

victim and removed United States currency therefrom. Appellant also searched the trunk of the victim's vehicle for the purpose of stealing and converting to his own use, a shotgun known by the defendant to be kept by the victim in that vehicle. Contrary to appellant's assertion, the testimony of Schmidt did not indicate that he was normally the leader; but it did indicate that he previously had never been a follower, with the exception of this one time (R 1048).

The testimony of Bobby Schmidt further indicated that the murder had been planned by the defendant, Craig for months prior to its commission, down to the last trivial detail as to how to prevent the body of the victim from being found; how and where to hide the victim's vehicle; how, when, and where the shooting of the victim was to occur; how the victim was to be lured to a secluded spot from which he could not reasonably hope for help or escape from death.

Appellant's reliance upon Stokes v. State, 403 So. 2d 377 (Fla. 1981), is unpersuasive. Stokes was a follower and member of the Outlaws motorcycle gang. He was not the leader. Contrary to the facts in the instant case, wherein appellant, Craig, was the foreman of the ranch, appellant was Schmidt's boss and controlled Schmidt's livelihood. Defendant Craig had everything to lose: his free home, free utilities, free phone, his job and any hopes of future employment, and risked imprisonment if he did not succeed in killing John Eubanks. Appellant Craig had the motive, Appellant Craig had the opportunity, and Appellant Craig masterminded Eubanks' death. There

is absolutely no evidence to support the assertion that Craig acted under coercion or domination of another. He fully participated in the planning, murder, and disposal of the victim's body. Compare White v. State, 403 So.2d 331 (Fla. 1981).

3. THE DEFENDANT'S AGE IS NOT A MITIGATING FACTOR.

Appellant contends that the trial judge should have found his youth to be a mitigating cricumstance. See Section 921.141(6)(g), Fla.Stat. Appellant's age at the time of the crime was twenty-three. In Simmons v. State, 419 So.2d 316 (Fla. 1982), this Court held that the judge was not required to find appellant's age to be a mitigating factor. See Songer v. State, 322 So.2d 481 (Fla.1975), vacated, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977); (Simmons was twenty-three years old). Accordingly, appellant's argument on this ground is without merit.

4. THERE WERE NO COMPELLING NONSTATUTORY MITIGATING FACTORS PRESENT.

The trial judge listened to and received testimony and argument in behalf of the defendant. He determined that the defendant failed to establish any nonstatutory mitigating circumstances sufficient to justify the imposition of a sentence less than death; and there were no other circumstances of merit in mitigation.

The time to present relevant evidence regarding the

imposition of the ultimate penalty upon the defendant was at the bifurcated penalty hearing. Appellant's counsel attempted at the sentencing hearing, to present other testimony that was being presented for the first time (R-2948). The judge refused to retry the case, inasmuch as some of the witnesses had testified at the trial of the defendant. Additionally, five (5) months had elapsed between the time that the presentence investigation had gone forth, and counsel for defendant had a copy of the report (R-2947). He had adequate opportunity to discuss the report in full with the appellant, and adequate time to take exceptions to anything found in the report. Further testimony would consist of an evidentiary hearing which is not contemplated under Florida's death penalty statute (R-2942,2945). Had appellant offered this additional testimony during the penalty phase, then his argument would be well taken. However, that is not the case, and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed. 2d 973, (1978) is not dispositive.

C. THE TRIAL JUDGE CONSIDERED APPROPRIATE AGGRAVATING CIRCUMSTANCES.

1. FINANCIAL (PECUNIARY) GAIN.

The trial court found as an aggravating circumstance as to both murders that they were committed for "financial gain." (R-2092,2101). This finding was appropriate.

Under the facts in the instant case, the appellant clearly planned the murder of Mr. Eubanks to prevent his discovery of his systematic theft and conversion of some eighteen thousand dollars worth of the victim's cattle from his ranch.

The testimony of Robert Schmidt indicates that appellant had planned to kill the victim, Eubanks, in order that Eubanks' widow, who knew nothing of the operation of the ranch, would be totally dependant upon appellant as foreman and that the appellant could then bleed off, sell and illegally convert to his profit the entire calf crop and the other major assets of the ranch without anyone knowing. His primary motives for the killing were in order to obtain monetary gain, and prevent detection. The killing of Bobby Farmer, was an "execution-style" or a "witness-elimination" murder, that was necessitated by appellant's greed and fear of detection. See generally, Menendez v. State, 419 So.2d 312,315 (Fla. 1982). It is clearly certain, that had appellant not committed the murders in question, that he would have been fired from his job, replaced by Bobby Farmer, and in all probability would have been charged with grand theft of the Eubanks' cattle. Under the circumstances sub judice, appellee would submit that the murders in question clearly were committed for financial gain. Bolender v. State, 422 So.2d 833 (Fla. 1982).

2. ESPECIALLY WICKED (HEINOUS) ATROCIOUS, OR CRUEL.

The trial court found that the murder of John Smith Eubanks was especially wicked, atrocious, or cruel in that the defendant had planned the murder for several months right down to the last detail as to how to prevent the body of the victim from being found; how and where to hide the victim's vehicle;

how, when, and where the shooting of the victim was to occur, how the victim was to be lured to a secluded spot in which he could not reasonably hope for help or escape from death (R-2094, 2095). The trial court further found that the victim realized that something had gone awry when he exclaimed to Bobby Farmer "Let's get out of here." (R-2095). That John Smith Eubanks was shot twice in the back of the head causing massive damage to his brain in an execution style murder. The appellee would maintain that the act of luring the victim into the Hammock area for the purpose of shooting Mr. Eubanks, compounded by appellant's prior to plans to murder Mr. Eubanks, constitutes sufficient "additional acts" to justify application of the heinous, atrocious, or cruel aggravating factor, under State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed. 2d 295 (1974). See Harvard v. State, 414 So.2d 1032, 1036 (Fla. 1982).

With respect to the killing of Robert Walton Farmer, the trial court found that the murder was especially wicked, atrocious, and cruel in that the victim sufferred multiple, vicious and brutal wounds inflicted by the appellant Craig, upon Bobby Farmer by shooting him five (5) times with a powerful firearm at close range. The testimony of Doctor Wilson indicates that Bobby Farmer was probably conscious and oriented as to his surroundings and what was occurring through all or most of the five (5) bullet wounds the evidence establishes were inflicted by the defendant. Doctor Wilson testified that Bobby Farmer would not necessarily have been

unconscious as he was being shot by appellant (R 1292,1305, 1322). Testomony indicates that the second wound inflicted on Bobby Farmer indicates that the bullet entered the right arm posteriorly, struck his elbow bone, and then went down the arm and existed. Doctor Wilson felt that it was easy to conceive of the arm being held in a position in kind of a defense posture with the bullet coming partly from the side of the individual. Appellant maintains that his shots were not designed to inflict pain upon the victim, but at worst they merely showed that defendant was a very poor marksman. The appellee is appalled at the appellant's argument that Farmer did not suffer pain because he did not design to inflict great pain. Merely because he did not intend to inflict great pain does not mean that he did not inflict great pain. The fact that Farmer's arm was raised in a defensive posture is sufficient to support the finding that the appellant, shooting him five (5) times, did in fact inflict great pain upon him and was unnecessarily tortureous and pitiless. State v. Dixon, supra. Therefore, the trial court did not err in finding this factor as to both counts.

3. COLD, CALCULATED, AND PREMEDITATED.

The trial court's finding that John Smith Eubanks was murdered in a cold, calculated and premediated manner without any pretense of moral or legal justification, was substantiated by the record. After systematically and continually bleeding the Eubanks ranch of its assets, further theft, sale and

conversion of his many heads of cattle, testimony showed that appellant's desire to faciliate his financial control over the assets of the Eubanks ranch, prompted him to plan and conceive and revise the murder of John Smith Eubanks. That the court found that the murder of John Smith Eubanks was governed not at all by any feelings of moral, christian or human decency or duty. That the defendant was well treated by the victim, that the victim provided for his use a home, free of rent, a motor vehicle, free of charge, a gasoline credit card to be used with that vehicle, and cost free utilities. However, appellant desired to obtain financial control over the assets of the Eubanks ranch, and therefore planned, directed, and executed a scheme to murder Mr. Eubanks.

Furthermore, the record clearly establishes that appellant knew that Mr. Eubanks was on to him, and that Bobby Farmer had become an impediment to his plans for financial gain through the theft of cattle from the Eubanks ranch; and it is abundantly clear that appellant altered his scheme of murder to include Bobby Farmer as an additional victim in order to successfully carry out his months old plan to murder John Smith Eubanks (R-2105). Bobby Farmer was a loose end that appellant, without compassion or compunction, determined to do away with. The killing of Mr. Eubanks, and Bobby Farmer was an execution style killing, that was committed without any compassion. . . without any pretense of moral or legal justification.

In Combs v. State, 403 So.2d 418, 421 (Fla. 1981)

this Court with respect to this issue held that:

> [T]he addition by the legislature of (i) to Section 921.141(5), in fact only reiterates in part what is already present in the elements of premediated murder, with which petitioner was charged and which the evidence clearly supports.

Id.

The evidence is overwhelming that the murders were committed in a cold, calculated and premediated manner without any pretense of moral or legal justification. The trial court's finding that aggravated circumstance (i) existed was proper. The finding of this circumstance is not an improper doubling of aggravating circumstances. Id.

4. AS TO COUNT II ONLY, CONVICTION OF ANOTHER CAPITAL FELONY.

Prior to the two murder convictions in this case, Robert Craig had no previous convictions. The trial court however, properly found as an aggravating circumstance, conviction of another capital felony as to Count II, based upon the conviction of the defendant as to Count I (R 2101). The appellant contends that this finding violates due process, and Craig's death sentence as to Count II must be reversed.

It is well settled that a violent felony committed after the capital felony and tried in the same trial as the capital felony can qualify as a "previous" violent felony for purposes of this aggravating circumstance. King v. State, 390 So.2d 315 (Fla. 1980). To hold otherwise would offend due

process and equal protection standards; finding the aggravating circumstance of "previous violent felony" in defendants with remote violent felonies yet absolving those felons who commit several violent crimes during a course of criminal conduct. Contemporaneous or subsequent violent crimes committed close in time to the capital felony are an accurate reflection on the history of the defendant's character.

The purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

Certainly, the fact that a defendant has been found guilty by a jury and adjudicated guilty by the trial court of violent crimes is material to a character analysis. A defendant previously convicted of a violent felony against the person of another should not be able to escape this character analysis by an argument that his conviction, which is presumed to be correct, is on appeal, or not final or is contemporaneous. See Ruffin v. State, 397 So.2d 277 (Fla. 1981).

5. NON-STATUTORY AGGRAVATING FACTORS.

The appellant contends that in the trial judge's penalty proceeding findings of fact he mentions, certain non-

statutory aggravating factors. These include the vote of the jury's life and death recommendations, the fact that Eubanks had treated the defendant well, and the defendant's alleged lack of human decency and a lack of Christian duty (R-2088, 2087, 2098,2105,2109).

The State would point out that the strength of the jury vote of death and weakness of its vote to recommend a life sentence were mentioned by the trial court only in the introductory paragraph of the Penalty Proceedings Findings of Fact. It is not included in the specific finding of facts as to Count I or Count II nor in the factual basis in support of such findings and it cannot be said that such a consideration played a part in the court's sentencing determination (R 2088-2110).

The fact that Eubanks had treated the defendant well and the appellant's lack of human decency and lack of christian duty in conceiving, planning, revising and executing the murder of Eubanks and Farmer is set out by the court as one of many bases for determining that the murders were committed in a cold, calculated and premediated manner. It is clear that the finding is predicated upon other proper statutory considerations (R 2088-2110).

Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of Supreme Court decisions on capital punishment has been "that discretion

must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, ___U.S. _____, _____, 103 S.Ct. 2733, 2741, 75 L.Ed. 2d _____ (1983), quoting Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

It has been held that in returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment. California v. Ramos, _____U.S. _____,_____, 103 S.Ct. 3446,3456, 75 L.Ed.2d ___ (1983). (emphasis added).

In a recent Supreme Court case, Barclay v. Florida, ____U.S.____, 103 S.Ct. 3418,___L.Ed. 2d ____(1983) Barclay contended that his sentence must be vacated because the trial judge, in explaining his sentencing decision, discussed the racial motive for the murder and compared it with his own experiences in the army in World War II, when he saw Nazi concentration camps and their victims. Barclay claimed that the trial judge improperly added a non-statutory aggravating

circumstance of racial hatred and should not have considered his own experiences.

The United States Supreme Court rejected his argument at 3424, stating:

> We reject this argument. The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found Barclay's desire to start a race war relevant to several statutory aggravating factors.[7] The judge's discussion is neither irrational nor arbitrary. In particular, the comparison between this case and the Nazi concentration camps does not offend the United States Constitution. Such a comparison is not an inappropriate way of weighing the "Especially heinous, atrocious and cruel" statutory aggravating circumstance in an attempt to determine whether it warrants imposition of the death penalty. (footnote omitted).

Similarly, in the case sub judice the fact that the trial judge took into account Eubanks' treatment of the appellant and the unchristian manner in which he was repaid for it is not prohibited by the United States Constitution and is no more irrational than the sentencing judges consideration in Barclay.

CONCLUSION

Based upon the foregoing arguments and cited authorities, Appellee would respectfully request that this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Evelyn D. Golden

EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to: James R. Wulchak, Assistant Public Defender, 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014, on this 7th day of November, 1983.

Evelyn D. Golden
Of Counsel