IN THE SUPREME COURT OF FLORIDA

DANIEL LEE DOYLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 62,212

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County. In the brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal, including all transcripts. All emphasis in this brief is supplied by Appellee, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case. Appellee also accepts Appellant's Statement of the Facts to the extent that it presents an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and/or clarifications:

The several statements given by Appellant were reviewed both during the hearing on the motion to suppress and at trial. Miramar Police Officer Robert Buzzo testified at both proceedings that Appellant was questioned because he was reported to be the last person to have seen the victim before her disappearance, although he was not initially a suspect (R 28-29). Defendant voluntarily agreed to meet Buzzo at the Miramar Police Station at 9:30 a.m. on September 6, 1981 (R 30). His girlfriend Karen Wentnick accompanied him (R 32). During the first statement, Appellant appeared to be in good physical condition, and was advised of his Miranda rights at the beginning of the statement, and stated that he understood those rights (R 33-34). The tape of the statement was played both at the hearing and at trial, and was transcribed by the court reporter (R 38-54, 1024-1042). At trial, whenever a taped statement of Appellant was played, the jury was given transcripts while the tape was being played, at the end of which the transcripts were collected and were not given to the jury during their deliberations since they had not been admitted into evidence (R 1023, 1119, 1131, 1135, 1148).

The substance of the first statement by Appellant was essentially a denial of any involvement in the murder. During

the course of the statement, he said that he dumped two loads of leaves and branches in the area near where the body was found on September 4, 1981 (the day before the homicide), near a large piece of machinery which was parked there called a front end loader (R 53). He also stated that on Saturday, September 5, his truck became stuck in the muck in the same general area (R 53). When the taped statement was completed, Buzzo questioned Appellant concerning discrepancies in his story, specifically that the clippings which he claimed to have dumped behind the mailbox area on September 5 appeared to have been dumped there considerably earlier than that date. Buzzo also told him that the front end loader which Appellant claimed was parked in the area on Friday was in fact not parked there until Saturday, September 5 (R 56-57, 1042).

Appellant then gave his second statement, and Buzzo testified that Appellant wanted to give a corrected statement (R 56-57). During that statement, Appellant claimed that his truck had become stuck in the muck on Saturday, and that while he was there an unknown white male on a motorcycle approached, and that it was this person who raped and strangled the victim while Appellant held her down. He claimed that he went along with this because the other person had a gun (R 57-58, 1043-1044). At that point, Buzzo told Appellant that he was under arrest for the murder (R 101, 1045). During both the first and second statements, Appellant's girlfriend Karen Wentnick was present (R 57-58). The second statement was not taped because Appellant did not want it to be taped (R 1045). Miramar Police Officer William Guess was also present during the second

statement which was not put on tape, and, like Buzzo, testified that Appellant admitted his involvement in the homicide during that statement (R 96, 1095). At the suppression hearing, Guess explained that he had spoken with Glen Shriver, the owner of the front end loader, before the first statement was taken and learned from Mr. Shriver that the piece of equipment was not at the site until Saturday (R 99). Those facts were confirmed at trial by Mr. Shriver's testimony (R 756-757). Miramar Police Detective Steven Alter also confirmed the account of the untaped second statement made by Appellant (R 121-123, 1078-1079).

At the suppression hearing, but not at trial, Officer Guess testified that the skeletal remains of another young woman, who was later determined to be Monica Ruddick, were found approximately two hundred yards east of where Pamela Kipp (the victim in this case) was found (R 90). Miramar Police Detective Richard Bellrose testified at the suppression hearing that he learned of the discovery of both bodies, and also learned that Appellant had dated Monica Ruddick. For that reason he decided to question Appellant further in the Miramar Police Department interview room (R 129-130). Bellrose advised Appellant of his rights, including his right to stop questioning (R 130-132). At the suppression hearing, Bellrose stated that Appellant denied any involvement in the Ruddick homicide (R 132). Thereafter, Bellrose left the interview room followed by Karen Wentnick who told him that if he could give her some additional information as to what happened to Monica Ruddick, she might be able to talk with Appellant and "shed some light on the situation." (R 132). Bellrose had not asked for her assistance in the case,

and told her that he had no objection but that he could not give out too much information. Wentnick returned to the interview room, closed the door, and came back out approximately ten or fifteen minutes later requesting that Bellrose enter the interview room because Appellant had something to tell him (R 132-133). At this time, Appellant made another statement, which was again not taped at his request (R 135). Appellant admitted that he was involved in the killing of Monica Ruddick (R 133-134). However, neither this statement nor any information concerning the Ruddick homicide was presented during the trial.

The next statement relevant to the Kipp homicide was also given to Detective Bellrose. At Appellant's request, it was not taped (R 1113). During this statement, Appellant admitted killing Pamela Kipp after asking her to help him to get his truck out of the hole in which it was stuck. He said that he became agitated after a board flew up and struck him in the hand, that he blacked out, and that when he came to he remembered doing something terrible and assumed that he had killed Kipp (R 1112). Karen Wentnick was present during this statement (R 1113). Later that night, Appellant told Bellrose that he could not recall any more details but that he would attempt to recall more and that if he could come up with anything, he would let Bellrose know (R 1114). Thereafter, Officer Ronald Peluso transported Appellant to the Broward County Jail (R 1114), and at trial Peluso testified that while he was driving Appellant, Appellant volunteered that he was glad that he had confessed the murder (R 1067-1068); on cross-examination, Peluso also said that Appellant mentioned blackouts and not knowing what happened (R 1069).

The next day, September 7, 1981, Appellant called Bellrose from jail saying that he wanted to speak with him (R 137-138, 1114). During this interview, Appellant said that he could not remember any more details (R 140, 1115). However, on the next day, September 8, 1981, Appellant agreed to give another taped statement. His rights were read to him (R 142-143, 1115-1116). At trial transcripts were given to the jury, and the tape was played (R 1120-1131), as it had been at the suppression hearing (R 144-169). However, at trial none of the portions of this tape discussing the killing of Monica Ruddick were included in the tape. During this statement, Appellant again said that he became angry when a board which he was trying to slip underneath a rear wheel of the truck struck him in the hand, and said that he blacked out and could not remember anything from there on (R 1123). However, he then recounted how he removed the victim's clothing, described having intercourse with her, and strangling her with her T-shirt. At first he said that she did not resist his efforts, but then said that she struck him four times, and pulled his hair (R 1124). He further detailed that the victim fought off his attempts and that he fought back (R 1128), and described how he carried her body out into the field because he figured that no one would know about it since no one had seen him kill her (R 1126). He then left the scene,and returned in his yellow Mustang after which another person with a four-wheel drive vehicle pulled his truck out (R 1126). During this statement, Appellant also described the clothes which he removed from the victim, their color, etc., and said that she was having her

period at the time that he had intercourse with her (R 1126-1127).

At the suppression hearing, Bellrose testified that after the tape recorder was turned off at the completion of the third statement, Appellant told him that he would be willing to speak with Bellrose again at a later time because he was glad to get out of the cell area and get "this off of his chest." (R 170). The next taped statement was taken by Bellrose at the Broward County Jail on September 11, 1981 at approximately 3:20 p.m. with Detective Buzzo also present (R 171, 1133). At the suppression hearing, only the transcript was reviewed; the tape was not played at that time (R 173). However, at trial the tape was played (R 1136-1148), before which the jury was again given transcripts (R 1135) which were collected at the end of the playing of the tape (R 1148). The standard rights reading and Appellant's acknowledgement of his rights occurred at the beginning of the tape, including his right to stop answering questions at any time until he spoke with an attorney (R 1136-1137). During this statement, he again said that he asked the victim to help him with the truck, but then said to forget it and as she was getting ready to leave he grabbed her, threw her to the ground, and started strangling her. They fought, and Appellant again said that he blacked out at that point; the next thing he realized was that he had strangled her but could not remember what he had done (R 1140). However, he then described how he strangled the victim with the T-shirt, describing its color (R 1140-1141). In this statement he said that the victim fought off his efforts, but that she was un-

conscious during intercourse (R 1143, 1145). Her dog was running around, and Appellant tied it to a tree so that no one would find it (R 1144). He described the details of his intercourse with the victim (R 1142-1143), and said that he took her out to the woods, and laid her face down (R 1143). Appellant described other details of the incident including what happened to the victim's ring and necklace, and said that it occurred on Saturday at around 4:30 p.m. (R 1146-1147). Karen Wentnick was present during this confession (R 1151-1152) as she had been during all statements made by Appellant at his request. At trial, she testified that Appellant admitted the murder to her on several occasions during phone calls from prison (R 1160).

One matter which was not brought out at trial but which was discussed during the suppression hearing was the fact that Appellant underwent hypnosis to attempt to recall further details of the incidents that were being investigated. Detective Bellrose testified that on September 15, 1981, after the last statement was given, Appellant was again advised of his rights (which was the eighth rights admonition by Bellrose up to that point), and was asked if he would be willing to undergo hypnosis to which he had no objections (R 174-175). The hypnosis took place that same day. The session lasted approximately an hour and was taped; under hypnosis Appellant admitted the homicide of Pamela Kipp, but denied killing Monica Ruddick (R 174-175). The tape was later lost. Bellrose spent at least ten hours looking for it, but never found it (R 175-176); he had placed his notes of the session in the folder with the tape, and that was lost as well (R 187). Martin Segall, the hypnotherapist,

described the hypnosis session, and explained that he took no notes because the session was being taped. Segall was sure that Appellant was under hypnosis during the session based upon Segall's experience in the field (R 110-111), and basically confirmed Bellrose's testimony that during the session Appellant admitted the one homicide, but denied the other (R 105-113). Segall felt that Appellant had no problem undergoing hypnosis as it related to his intellectual level, and the only problem was initially establishing a rapport so that Appellant would have trust and confidence in him (R 119).

POINTS ON APPEAL

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ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENT DUE TO THE LOSS OF THE TAPE RECORDING OF APPELLANT'S STATEMENT WHILE UNDER HYPNOSIS.

Appellant alleges reversible error in the failure of the trial judge to dismiss the case due to the loss of the tape of the hypnosis session and of Detective Bellrose's notes of that session along with the tape. The underpinning of Appellant's argument is that the substance of Appellant's statements during the hypnosis session, which occurred after all of the other statements had been given, could have been especially important to the defense as a vehicle for possible further evaluation of what Appellant alleges were numerous and important contradictory elements of his prior statements. Appellee maintains that there is absolutely no basis for reversal under this point.

Appellee would respectfully request this Court to review all of the statements made by Appellant which have been outlined in Appellee's Statement of the Facts. When read successively, Appellee maintains that the statements do not present essential, contradictory elements, but rather demonstrate a logical progression from denial of guilt to admission thereof. Specifically, in the first statement Appellant denied involvement in the Kipp murder. In the second statement, he admitted involvement but claimed that the primary perpetrator was some

unknown white male. During the third statement (R 1112), which was not taped, Appellant finally admitted that he alone killed Pamela Kipp, but maintained that he "blacked out" during the incident. Significantly, Appellant told Bellrose at that point that he would try to recall more details about the incident and would contact Bellrose if he did (R 1114). Appellant did in fact contact Bellrose, and the fourth and fifth statements, both of which were taped (R 1120-1131; 1136-1148), are essentially alike. The two statements share what Appellant submits is a minor inconsistency; that is, in both statements Appellant claimed that the victim complied with his efforts, but also said that they fought during the incident. Comparing the two statements, Appellee further submits that they differ in only one detail, and that is that in the fifth statement Appellant said that the victim was unconscious during intercourse (R 1143, 1145), which he did not say during the fourth statement. It is particularly important to note that all of these statements were made before the hypnosis session on September 15, so that none of the additional details which Appellant was able to progressively provide can be claimed to have been the product of a hypnotic process, suggestive or otherwise.

Appellant also argues that the tape of the hypnosis session was essential to the defense because it was unclear which of the two homicides Appellant denied committing during that session. Appellee acknowledges that the testimony of the hypnotist Martin Segall (R 105-119) is unclear on this point because Mr. Segall could not recall the names of the victims (R 113), and referred to the two murders as "the one" homicide

and "the second one." However, Detective Bellrose was unequivocal in his testimony that Appellant admitted killing Pamela Kipp and denied killing Monica Ruddick (R 175). His testimony on this point is buttressed by the detail with which Appellant was able to describe the murder of Pamela Kipp in his fourth and fifth statements, discussed above, especially regarding the victim's ring (R 1146) which was found during the search for her body, the discovery of which in fact lead to the discovery of her body (R 790-795, 850-853).

Further, regarding the issue of the alleged prejudice due to the loss of the tape, when the trial judge announced his ruling denying the motion to dismiss, he questioned whether there could have been any prejudice because he felt that the admissibility of the tape of that session was questionable at best (R 289). Interestingly enough, just before the State rested, the prosecutor proffered the portion of the hypnosis testimony where Appellant admitted killing Pamela Kipp, and defense counsel's objection to that testimony was made and sustained on the same basis upon which the trial judge had questioned its admissibility at the end of the suppression hearing (R 1174-1175). If for no other reason than that, the defense should now be estopped to argue prejudice because of the unavailability of the tape. Finally, there has never been any contention in this case that the missing tape was intentionally lost or destroyed. As Appellee has argued, the homicide which Appellant denied during the hypnotic session was the Ruddick murder, and not the murder of Pamela Kipp. Thus, Appellee maintains that there was neither an intentional withholding of evidence nor any denial of due process because there is no

indication that the missing tape recording would have been beneficial to Appellant, even if it would have been admissible. See State v. Sobel, 363 So.2d 324, 328 (Fla. 1978).

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING APPELLANT'S STATEMENTS INTO EVIDENCE.

A

APPELLANT WAS GIVEN ADEQUATE WARNINGS REGARDING HIS CONSTITUTIONAL RIGHTS.

Appellant argues that the admonitions given him at the beginning of his taped statements to the police were inadequate under Miranda v. Arizona, 384 U.S. 436 (1966), because only at the beginning of one of the three statements was there an explicit warning of his right to terminate interrogation. Appellee maintains that there is absolutely no merit to this argument either in fact or in law.

An examination of the statement taken on September 6, 1981 (R 1024-1042), September 8, 1981 (R 1120-1131), and the statement taken on September 11, 1981 (R 1136-1148), will show that each interrogation was initiated with a textbook-perfect recitation of the warnings mandated by the Miranda case. The Miranda opinion itself clearly comprehends that a proper recitation of the warnings prescribed in that case would advise a defendant not only of his right to remain silent initially, but also of his right to cutoff questioning. 384 U.S. at 445, 473-474. In light of the clarity of the warnings delivered on each occasion at issue in this case, that conclusion clearly applies in this case.

Moreover, Appellant concedes that an explicit statement of his right to terminate questioning was delivered during

one of the interrogations, but faults the other two for the lack of that same warning. However, Appellant's argument fails upon a close scrutiny of the statements. First, he incorrectly states that Detective Bellrose advised Appellant of his right to terminate questioning during the statement of September 8. Actually, the "model warning" was delivered at the beginning of the September 11 statement (R 1136-1137), not at the beginning of the September 8 statement (R 1120-1121). Significantly, it was during the September 8 statement that Appellant explicitly indicated that he understood his right to terminate questioning despite the alleged lack of adequate warnings. Near the end of that interrogation, when Detective Bellrose was asking him about his sex drive and his sexual preferences, Appellant noted that he had been cooperative up to that point, but said that if that line of questioning continued, "I'll just put a stop to it now. I'll just go back." (R 168, 1130). The full context of this statement by Appellant appears only in the tape which was played during the suppression hearing, because extraneous matters had been edited from the version of the tape which was played at trial (compare R 164-168 with R 1129-1130). Thus, the record clearly establishes that Appellant was fully aware of his rights to limit or terminate questioning even before that right had been presented to him in those terms by Detective Bellrose on September 11.

B

SUFFICIENT EVIDENCE WAS ELICITED TO DEMONSTRATE THAT APPELLANT WAS CAPABLE OF A KNOWING AND INTELLIGENT WAIVER OF HIS FIFTH AMENDMENT RIGHTS.

Appellant here argues that his statements should have been suppressed because there was insufficient evidence demonstrating his mental capacity to knowingly and intelligently waive his Fifth Amendment rights. The trial court's determination on this type of an issue is entitled to the usual presumption of correctness which attends a lower court's determination of suppression issues generally. See Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980). Appellee maintains that the trial judge's conclusion on this issue is adequately supported by the testimony.

Regarding Appellant's intelligence level, Dr. Seth Krieger, a clinical psychologist, interpreted I.Q. tests which had been taken when Appellant was nine years old and sixteen years old (R 224). Dr. Krieger had not done any formal I.Q. testing of Appellant himself (R 224), but did assess his intelligence clinically based on his observation of Appellant and concluded that his I.Q. level was between 70 and 80; between 90 and 110 is average, and between 80 and 70 is below average (R 227). This assessment appeared to be higher than the two tests which had been taken when Appellant was nine and sixteen years of age (R 227-228). [At trial, Dr. John McClure, another clinical psychologist who tested Appellant in January of 1981, testified that Appellant's verbal I.Q. was 71, and his per-

formance I.Q. was 85. The full scale I.Q. was 75, which placed Appellant in the lower 5 percent of the normal population in a range which is called borderline retardation (R 1212).]

A comparison of these evaluations with those of defendant Ross, id. at 1194, will show that Appellant's I.Q. in each category was higher than Ross', and the testimony of Dr. McClure at trial appears to validate Dr. Krieger's evaluation at the suppression hearing that Appellant's I.Q. had improved since the two tests that had been taken at earlier ages. On cross-examination, Dr. Krieger testified that Appellant had dyslexia, and could not write the alphabet. However, he also testified that Appellant would know what an attorney was, that if he was told that he did not have to speak to the police he would have no problem with that, and that if he was told that he had the right to remain silent he would understand that (R 238-239). Dr. Krieger also stated that Appellant clearly knew that if he spoke with the police he was putting himself in jeopardy (R 241-242).

Dr. Krieger had not seen the report (R 242) filed by Dr. Arnold Eichert, a court-appointed psychiatrist who had examined Appellant (R 268-269). Dr. Eichert testified that he felt that Appellant suffered from some sort of organic brain defect (R 269), but also concluded that Appellant's intelligence was sufficient to enable him to understand what an attorney was, his right to remain silent, and that he would understand his Miranda rights if they were read to him (R 269-271). Mr. Martin Segall, the hypnotherapist, had no doubt that Appellant understood his rights when they were read to him (R 115).

Perhaps most significantly, it should not be forgotten that Appellant was not a neophyte to the criminal justice system at the time of this investigation. In fact, George Evans, an attorney who was representing Appellant on a prior case (R 76), testified that Appellant would understand if someone advised him of his right to have an attorney during a taped statement (R 81). During a colloquy between the trial judge and Mr. Evans, it was established that Appellant had entered a plea in the prior case, but that efforts to withdraw the plea were under way because the trial judge in that case had allegedly gone outside the parameters of the plea negotiations. Nevertheless, the trial judge felt that the fact that Appellant had experienced that plea proceeding was relevant to the point at issue herein (R 83-85). Finally, despite Dr. Krieger's reservations concerning the Miranda issue, he had no question about Appellant's competence to stand trial (R 235).

Given this state of the record, Appellee maintains that despite Appellant's intellectual limitations, the record demonstrates that the trial judge was correct in rejecting this as a basis for suppression of the statements. At the time the statements were given, Appellant was almost twenty-two years old (R 1120, 1122). His I.Q. scores were higher than the scores of the defendant in Ross. Appellant was no stranger to the criminal justice system (R 83-85, 1549). Finally, as Appellee has demonstrated under part A of this point, Appellant's conduct during the statements clearly demonstrated that he was aware of his rights. Given this record, suppression on the basis urged

here would have been an error.

C

THERE WAS NO NECESSITY TO TERMINATE THE INTERROGATIONS BECAUSE APPELLANT DID NOT REQUEST AN ATTORNEY.

By now it is axiomatic that a trial court's ruling on a motion to suppress is clothed with the presumption of correctness on appeal, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). Given that standard of review, and the record in this case, Appellee maintains that there is no basis for reversal of the trial judge's determination of the issue raised here. Specifically, Appellant alleges that the interrogation should have ceased based on the dialogue from the first taped statement which he quotes at page 16 of his brief. Appellant alleges that his statement that his attorney was out of town was an invocation of his right to the assistance of counsel as that issue was addressed by the United States Supreme Court in Edwards v. Arizona, 451 U.S. 477 (1981).

There are two prongs to Appellant's argument here. The first is that Appellant himself sought to obtain the assistance of counsel before he gave the statements to the police. However, the transcript references for that assertion are from the direct examination of Karen Wentnick, Appellant's girlfriend. On cross-examination, she acknowledged that she could not recall whether obtaining an attorney was her idea or Appellant's (R

(R 259). She also acknowledged that the police allowed her to be with Appellant during interrogation at Appellant's request (R 255-256), and that Appellant was voluntarily talking with the police (R 265). Based on her testimony, the trial judge specifically found that Appellant never asked Wentnick to obtain a lawyer for him, and that his statements were made voluntarily (R 293-294). The trial judge's conclusion is buttressed by the consistent testimony of the officers that Appellant never requested an attorney (R 60, 124-125, 142-143); the transcripts of the statements bear this out.

The second prong of Appellant's attack is that simply because the police knew that Appellant had an attorney and that efforts were being made by others to contact the attorney, the interrogation should have been terminated under the teachings of the Edwards case. Appellee maintains that the trial judge properly rejected this argument, concluding that even if someone else was attempting to obtain counsel for him, it is only Appellant's assertion of his right to counsel which would necessitate the termination of interrogation (R 293-294).

Appellant is asserting in this case a principle which has become known as the "New York Rule." That rule is based upon the provisions of the New York state constitution, and has been articulated in a line of New York cases beginning with People v. Donovan, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963). The basic proposition of that rule is that once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing him, the defendant's right to counsel attaches and may not be waived in the

absence of counsel. As the New York courts have acknowledged, their rule extends protection to a defendant beyond that which is afforded by the federal constitution. See People v. Hobson, 384 N.Y.S.2d 419, 348 N.E.2d 894, 897-898 (1976). For example, even in the Edwards case, while the Court held that whenever a defendant expresses in any way a desire for an attorney all interrogation must cease until and unless it is initiated by the defendant himself, the Court never required, as does New York, that the defendant could not initiate further interrogation unless it was in the presence of his attorney.

Moreover, Appellant's argument finds no support in Florida cases. For example, in State v. Craig, 237 So.2d 737 (Fla. 1979), the Fourth District had reversed the conviction, deciding that the defendant had not waived his right to counsel because during the interrogation he had stated that "in a way" he would like to have an attorney but concluded that he did not "see how it can help me." Id. at 739. This Court quashed the district court's decision, noting that on the day the defendant surrendered to police he had been orally warned of his rights to have an attorney and to remain silent, and that the rights had been put in writing and explained to the defendant, after which he signed the written warnings. While this was happening, the defendant's family had secured an attorney for him and notified a deputy that the defendant had an attorney. All of this occurred on a Saturday, and the defendant declined the opportunity to communicate with anyone. The next day, Sunday morning, he was again advised of his rights by an assistant state attorney at which time his statement was taken.

This Court decided that Craig's statement about counsel did not vitiate the voluntariness of his waiver. Furthermore, as the dissenting justice pointed out, id. at 742, Craig's attorney was at the jail on Sunday morning asking to see him. Nevertheless, this Court held as follows:

> A verbal acknowledgment of understanding and willingness to talk, followed by conduct which is consistent only with a waiver of his right to have a lawyer present, by one who has been advised of his rights, constitutes an effective waiver of his right to counsel at that stage of the proceeding.

Id. at 741. See also, State v. Brown, 261 So.2d 186, 187 (Fla. 2nd DCA 1972). But cf. State v. Alford, 225 So.2d 582, 585 (Fla. 2nd DCA 1969)(defendant never advised of his Miranda rights).

The pivotal point on this issue is that where, as here, an accused has been fully advised of his rights, the simple fact that he has an attorney does not vitiate the voluntariness of an otherwise valid waiver of those rights unless the defendant indicates that he wants to see the attorney. That was clearly not the case here, as the trial judge found. Nor do the cases cited by Appellant support his position. For example, in DelDuca v. State, ___So.2d___, Case No. 80-253 (Fla. 2nd DCA Op filed October 15, 1982), the defendant's attorney had visited him in jail before the interrogation began, and thereafter requested that there be no questioning outside of his presence. Appellee in the instant case does not maintain that an attorney cannot visit his client before interrogation, advise him to remain silent, and then tell the police that his client has decided to follow his advice. DelDuca stands for nothing more than that unremarkable

proposition. Silling v. State, 414 So.2d 1182 (Fla. 1st DCA 1982), is a garden variety Edwards case, where the defendant stated that she did not want to answer any more questions without conferring with an attorney, and where the police continued the interrogation despite the defendant's assertion of a right to counsel. Finally, if the pertinent facts of the case of Jennings v. State, 413 So.2d 24 (Fla. 1982), also cited by Appellant, did not establish an Edwards violation, then certainly there was no such violation in the instant case. Therefore, Appellee maintains that the trial judge did not err in denying the motion to suppress for any of the several reasons argued by Appellant under this point.

POINT III

THERE WERE NO PREJUDICIAL COMMENTS BY THE TRIAL COURT JUSTIFYING A NEW TRIAL.

Appellant argues two instances of comments by the trial judge which he maintains were improper and should have been the basis for a new trial. Appellee maintains that when the two instances are read in context, it will become apparent that there is absolutely no merit to the issues raised here.

The first instance occurred during the voir dire of the jury (R 532-540). The prosecutor was questioning one of the prospective jurors, and asked him whether he could convict on a confession alone. After thinking about it, the juror said that while he would not expect a live witness to come forward, he also would not expect that "a page and a half statement" would be sufficient to determine the fate of an individual (R 535). After further questions were asked, the trial judge intervened and explained that the State must prove two basic elements, that the crime was in fact committed, and that the defendant was the person who committed it, and then made the statement to which Appellant takes exception that the State would present more evidence than simply a confession (R 537). Defense counsel objected during a side bar conference, and the trial judge responded that on two occasions both sides had raised the issue of deciding the case on a confession alone. He felt that the matter should be clarified for the prospective jurors because if the only evidence presented is a confession a directed verdict would result (R 540).

As a matter of law, the trial judge was correct because a confession may not be received in evidence unless there is some independent proof of the corpus delicti. Schneble v. State, 201 So.2d 881, 883 (Fla. 1967), vacated on other grounds, 392 U.S. 298 (1968). Given that principle of law, and when viewed in context, it is obvious that the trial judge was attempting to clarify the preliminary posture of the case for the prospective jurors so that they could more accurately answer questions relating to their ability to hear and decide the case. As such, the trial judge was just doing his job and was not in any way expressing his view of the evidence or violating his status of neutrality.

Appellant also complains about the courteous treatment afforded a witness by the trial judge after a supposedly sarcastic exchange between that witness and defense counsel (R 725-727). The prosecutor properly responded to defense counsel's objection that the witness was simply attempting to explain his answer to defense counsel. Regarding the judge's demeanor, Appellant's complaint is fanciful at best. Even a cursory review of the transcript will show that at the beginning and end of the testimony of each and every witness during the trial the judge greeted and then excused the witness with an exceptional degree of friendliness and courtesy. He did the same when greeting the jury at the beginning of each day of trial. Thus, his treatment of witness Fernandez was consistent with his demeanor throughout the trial and did not indicate any singular approval of Fernandez' testimony. If anything, the judge's demeanor should provoke applause, not appeal.

POINT IV

THE TRIAL JUDGE DID NOT ERR IN DENYING A NEW TRIAL FOR ALLEGED JUROR MISCONDUCT.

Appellant alleges two instances of jury misconduct as the basis for a new trial. One allegation is that two members of the jury were observed in a restaurant and were overheard saying that Appellant was obviously guilty, and that one could tell he was guilty just by looking at him (R 1544). This instance of alleged misconduct is precisely that--an unverified allegation. The allegation appears in the amended motion for new trial (R 1544), but nothing in the record indicates that the incident ever in fact occurred.

The other instance about which Appellant complains was the statement by a juror wishing defense counsel good luck and telling him that he would need it (R 1182). That incident took place after the State had rested (R 1175), and before the defense began to present evidence. At that point, the prosecution had presented numerous witnesses placing Appellant in the area of the homicide on the day it occurred, as well as Appellant's several statements confessing the crime. While a juror certainly should not speak with either attorney, given the posture of the case when the juror spoke with defense counsel, it had to be obvious to everyone that the defense was facing a formidable task. The juror's conduct indicated nothing more than that, and did not indicate that she could not consider the defense side of the case with an open mind.

Furthermore, while the trial judge denied the mistrial motion, he did deliver a cautionary instruction to the jury in

the manner suggested by defense counsel (R 1183-1186). While defense counsel still preferred a mistrial, he did acknowledge that the instruction was a good one (R 1186-1187).

The determination of whether substantial justice warrants the granting of a mistrial is within the discretion of the trial court. Evers v. State, 280 So.2d 30, 31 (Fla. 3d DCA 1973). A motion for mistrial during the middle of a criminal trial should not be granted unless there is an absolute legal necessity to stop the trial and discharge the jury. Dunn v. State, 341 So.2d 806, 807 (Fla. 3d DCA 1977). Finally, dealing with the conduct of jurors is also a matter within the trial court's discretion. Walker v. State, 330 So.2d 110, 112 (Fla. 3d DCA 1976). Given these principles, Appellee maintains that there was no reversible error in this case based on any alleged juror misconduct.

POINT V

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH SENTENCE ON APPELLANT.

In this case, by a vote of eight to four, the jury recommended that the court impose the death penalty upon Appellant (R 1533). The trial judge agreed with the jury's advisory verdict (R 1572), and filed written findings supporting the sentence (R 1575-1580). Of course, Appellant challenges that determination, but Appellee maintains that the trial judge was correct in his disposition of the aggravating and mitigating circumstances presented in the statute, and appropriately determined that those circumstances justified the death penalty.

Appellant does not challenge the judge's determination that the murder was committed while he was engaged in or was attempting to commit a rape (R 1576). §921.141(5)(d), Fla. Stat. (1981). However, Appellant does challenge the judge's findings regarding two other aggravating circumstances. His first attack is on the judge's determination that the murder was committed for the purpose of avoiding or preventing a lawful arrest (R 1576). §921.141(5)(e), Fla. Stat. (1981). In his statement given on September 7, 1981, Appellant described how he carried the victim's body out into the field because he figured that no one would know about it since no one had seen him kill her (R 1126). On September 11, 1981, after describing the details of his intercourse with the victim, Appellant said that he took her out to the woods, and laid her face down (R 1143). He also tied her dog to a tree so that no one would find it (R 1144). As the trial judge noted in his findings

of fact, Appellant knew the victim since she was his third cousin, and he "assisted" searchers looking for the body by leading them away from the area where he had dumped it. The judged also considered the impact of Appellant's awareness of the consequences of a criminal act on the sentence which he might receive in a prior case in which he had entered a plea.

Appellee acknowledges the rule stated by Appellant at page 29 of his brief as that rule was explained by this Court in Riley v. State, 366 So.2d 19 (Fla. 1978), and in Menendez v. State, 368 So.2d 1278 (Fla. 1979). Nonetheless, Appellee maintains that the trial judge's determination was correct. The judge cited the case of Washington v. State, 362 So.2d 658, 665-666 (Fla. 1978), where the defendant buried the victim's body in a shallow grave in his backyard and surrendered only after he learned that he was sought by the police. This scenario parallels Appellant's removal of the body into the woods, and his grudging acknowledgment of his involvement in the homicide after having been confronted with the inconsistencies presented in his first statement to the police. Perhaps most instructive on this point is this Court's opinion in Adams v. State, 412 So.2d 850 (Fla. 1982). The Adams case involved the rape and strangulation of an eight year old girl whose body was left in a wooded area. This Court upheld the trial judge's determination that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Acknowledging the rule of the Riley case, this Court concluded the following:

> The record shows that the victim knew and could have identified defendant; that he encased the body in white

> plastic garbage bags and tied it with rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978,to March 15, 1978.

412 So.2d at 856. While Appellant in the instant case was not as successful in concealing his crime for as long as the defendant in Adams, Appellee maintains that this Court's reasoning in that case supports the trial judge's determination here. See also Martin v. State, 420 So.2d 583, 585 n. 3 (Fla. 1982) ("[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest inasmuch as the defendant was destroying the chief witness in the person of his victim.") Since the instant case was not just a strangulation murder, but a sexual battery as well, the trial judge was entitled to conclude (especially in light of Appellant's own words) that the murder was committed to avoid the consequences of the sexual battery.

The trial judge also determined that the capital felony was especially heinous, atrocious, or cruel (R 1577). §921.141(5)(h), Fla. Stat. (1981). Appellant challenges this finding as well, a challenge which Appellee finds to be almost incredible in light of the plethora of cases involving a murder in the course of a sexual battery where this aggravating circumstance was found to apply. See, e.g., Stevens v. State, 419 So.2d 1058, 1064 (Fla. 1982); Hitchcock v. State, 413 So.2d 741, 746-747 (Fla. 1982); Adams v. State, supra, 412 So.2d 850, 856 (Fla. 1982); Ruffin v. State, 397 So.2d 277, 281-282 (Fla.

1981); Peek v. State, 395 So.2d 492, 499 (Fla. 1980); LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978); Goode v. State, 365 So.2d 381, 384 (Fla. 1978); Hoy v. State, 353 So.2d 828, 832-833 (Fla. 1977); Witt v. State, 342 So.2d 497, 499 (Fla. 1977); Alford v. State, 307 So.2d 433, 443 (Fla. 1975); Hill v. State, ___So.2d ___, Case No. 60,144 (Fla. Op filed July 15, 1982)[7 F.L.W. 324].

At the sentencing hearing, Dr. Ronald Wright testified that after viewing the body at the scene and after performing the autopsy, he concluded that the victim had died after a struggle. This was indicated by the abrasions to her knees, the strangulation injury to her neck, and five separate areas of bleeding beneath the scalp indicating that there were at least five or more separate blows delivered to the head, during which the victim was alive (R 1318-1319). Of course, Appellant's last two tape recorded statements acknowledged that he fought and struggled with the victim. Dr. Wright also testified that the victim would have been aware of the strangulation for at least a minute, and that if during the strangulation there was any release of pressure, she could have taken another breath which would have extended her period of awareness even more (R 1320). In addition, the bleeding in the vaginal area indicated that the victim was alive during the sexual battery (R 1320). At trial, Dr. Wright also described bruises to the victim's pectoralis muscle in the area of the armpits (R 965). The evidence of hemorrhage around the thyroid cartilage in the back part of the larynx indicated an extreme amount of force in the area of forty pounds or greater in order to produce that kind of injury (R 966).

As is true regarding murders committed in the course of a sexual battery, strangulation cases almost invariably are found to be heinous, atrocious or cruel. See e.g., Martin v. State, supra, at 585 n. 3; Stevens v. State, supra, at 1064; Quince v. State, 414 So.2d 185, 187 (Fla. 1982); Adams v. State, supra, at 854; Smith v. State, 407 So.2d 894, 903 (Fla. 1981); Peek v. State, supra, at 499; Witt v. State, supra, at 499; Hill v. State, supra. By its very nature, strangulation involves the kind of awareness and suffering by the victim before death which this aggravating circumstance was meant to encompass, unlike a single, unexpected and fatal gunshot. Cf. Maggard v. State, 399 So.2d 973, 977 (Fla. 1981). Finally, Appellee maintains that the trial judge was correct in noting that while a lack of remorse cannot be considered as an aggravating factor, it can be considered by the jury and judge as a factor "which goes into the equation of whether or not the crime especially heinous, atrocious, or cruel." Sireci v. State, 399 So.2d 964, 971 (Fla. 1981).

Against this array of authority, Appellant offers a "parade of horribles," attempting to demonstrate that the instant case did not qualify for this aggravating circumstance by comparison with the cases which he cites. Admittedly, the facts of some cases are even more hideous than others, but that does not mean that the facts of the other cases do not cross the threshold comprehended by this aggravating circumstance. The law governing capital sentencing does not require that the victim be stuffed kicking and screaming through a meatgrinder, and it would be a sad day indeed if a sexual

battery/strangulation was considered run-of-the-mill under the law.

Regarding mitigating circumstances, Appellant argues that the trial judge should have found Appellant's low intellectual capacity and his emotional problems to be mitigating factors as specified in §921.141(6)(b) and/or (f), Fla. Stat. (1981). In considering this argument, it is important to note that at the outset of his written findings, the judge stated that he had made an independent review of the evidence and considered the advisory sentence of the jury recommending death (R 1575), and at the conclusion of the findings he stated that he agreed with the recommendation of the jury (R 1579). Appellee maintains that this is not a case where the trial judge refused to consider the allegedly mitigating evidence, since at the sentencing hearing he stated that "none of the mitigating circumstances are really applicable at least to the point that it would overcome the aggravating circumstances (R 1412)." In this regard, the case of Smith v. State, supra, 407 So.2d 894 (Fla. 1981), is particularly instructive. The defendant in that case argued that prior cases demonstrated that the mitigating circumstances at issue in the instant case should have been applied in Smith. This Court rejected that argument as follows:

> In two of these cases, Burch v. State, 343 So.2d 831 (Fla. 1977), and Shue v. State, 366 So.2d 387 (Fla. 1978), we reversed death sentences because the trial judges had ignored the juries' recommendations of a life sentence. Although both cases demonstrate that evidence regarding a

> defendant's mental state may be taken in mitigation, their greater emphasis seems to be on the deference which is to be accorded a jury's sentencing recommendation. The jury here recommended imposition of the death sentence.

407 So.2d at 901. This Court then discussed and distinguished the case of Huckaby v. State, 343 So.2d 29 (Fla. 1977), as follows:

> While the situation in Huckaby warranted an invasion of the trial court's domain, such is not the case here. The trial court here did not ignore every aspect of the medical testimony regarding the appellant; rather, it found that the medical testimony simply did not compel application of a mitigating factor in sentencing. Unlike the court in Huckaby, the trial court did not improperly refuse to recognize certain mitigating circumstances; rather, it considered the evidence presented regarding the defendant's mental state and then made its decision, which we are not to disturb unless absolutely required to do so.

Id. at 902. Then, quoting the opinions in Lucas v. State, 376 So.2d 1149, 1153-1154 (Fla. 1979), and in Hargrave v. State, 366 So.2d 1, 5-6 (Fla. 1978), this Court agreed with the State's argument that it was within the province of the trier of fact to weigh the expert and lay testimony presented in those cases; the jury and judge were entitled to conclude that little that testimony should be given/or no weight in their decisions. While the jury and the judge could have resolved the evidence in favor of the defendants' positions, they were not compelled

to do so. This Court in Hargrave stated that the trial judge

> did not ignore or fail to consider the psychological evidence baring on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances.

407 So.2d at 902-903. In Smith, this Court concluded that it was not warranted to disturb the trial court's findings because the decision was one "within the domain of the judge and jury, and a reversal thereof is not justified simply because appellant draws a different conclusion from the testimony presented than did the jury." Id. at 903. See also Quince v. State, supra, 414 So.2d 185, 187 (Fla. 1982)(mere disagreement with the force to be given mitigating evidence is an insufficient basis for challenging a sentence).

Appellee maintains that the same reasoning applies here, where both the judge and jury heard the allegedly mitigating evidence, but obviously rejected it; their agreement is an important factor to be considered by this Court. See Goode v. State, supra, 365 So.2d 381, 384 (Fla. 1978). Regarding the evidence presented, Appellee would respectfully direct this Court's attention to the facts recited under Point IIB of this brief. At trial, Dr. John McClure classified Appellant in the lower five percent of the normal population in a borderline range (R 1212). At the sentencing hearing, while Dr. Arnold Eichert testified regarding Appellant's organic brain problem, he also felt that Appellant was probably brighter than his tests would show (R 1327). In Ruffin v. State, supra,

at 283,this Court held that the trial court in that case did not err in not finding Ruffin's "dull normal intelligence to be a mitigating factor." A similar result obtained in Quince v. State, supra, at 186, where the consensus was that the defendant was "of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial."

At the sentencing hearing, Dr. McClure testified that due to a severe personality disorder Appellant lacked the ability to control his moods and impulses (R 1345), although he also felt that Appellant was malingering to produce psychotic symptoms during the examination (R 1350). In Sireci v. State, supra, at 971, this Court held that the evidence of personality disorders in that case did not constitute mitigating factors. In LeDuc v. State, supra, at 151, a psychiatric report found that while the defendant was not psychotic, he was "a very schizoid individual;" this Court ruled that the evidence was insufficient to compel a finding of the existence of either of the psychological mitigating factors. In sum, Appellee maintains that, as in the Smith case, supra, the trial court's findings regarding the psychological mitigating circumstances should not be disturbed,especially in light of the fact that both the jury and the judge heard and rejected the relevant expert and lay testimony. This case stands in contrast to cases such as Mines v. State, 390 So.2d 332, 335 (Fla. 1980), where all of the psychiatric testimony confirmed that the defendant was a schizophrenic, chronic paranoid type, and it contrasts as well with Jones v. State, 332 So.2d 615, 619 (Fla.

1976), where the defendant suffered from a paranoid psychosis, and where the jury had unanimously recommended a life sentence.

As further support on this issue, Appellant argues that the trial judge should have considered his intoxication and drug use at the time the crime was committed. However, that type of argument has been rejected in numerous cases. See, e.g., Stevens v. State, supra, at 1064; Simmons v. State, 419 So.2d 316, 319 (Fla. 1982); Hitchcock v. State, supra, at 474; Stone v. State, 378 So.2d 765, 772 (Fla. 1979); Songer v. State, 322 So.2d 481, 484 (Fla. 1975). Of special note here is the Stone case, where this Court pointed out that the defendant discussed the fact that he was in trouble and the advisability of running away shortly after the killing; at the trial in the instant case, Larry Goode testified that at 7:00 p.m. on the evening of the murder Appellant appeared nervous and wanted to get out of the neighborhood (R 781), and Christine DeSantis testified that on that same evening Appellant said that he had to get out of town because he was going to be arrested and appeared to be nervous (R 881). Finally, in Buford v. State, 403 So.2d 943, 953 (Fla. 1981), the defendant claimed impaired mental capacity due to the consumption of alcohol and drugs, but this Court concluded that his ability to give a detailed account of the crime was inconsistent with that contention. Similarly, in the instant case, while Appellant claimed to have suffered blackouts, Appellee maintains that the extent of the details of the crime which he gave in his later statements to the police renders the conclusion in Buford applicable to the instant case as well.

In conclusion, Appellee asserts that the trial judge properly followed the advisory determination of the jury in sentencing Appellant to death. Three aggravating circumstances were found, and no mitigating circumstances. Furthermore, even if one of the aggravating circumstances was improperly applied, the sentence should still stand. See Brown v. State, 381 So.2d 690, 696 (Fla. 1980).

CONCLUSION

Based on the foregoing Argument, Appellee respectfully submits that no error was committed by the trial court and respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to Michael D. Gelety, Esq., Suite 301, 727 N.E. Third Avenue, Fort Lauderdale, Florida 33304, this 3rd day of January, 1983.

Of Counsel