IN THE SUPREME COURT OF FLORIDA

LARRY DONNELL BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 62,922

BRIEF OF APPELLEE

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ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S OBJECTION TO THE PROSECUTOR'S STATEMENT IN CLOSING ARGUMENT THAT APPELLANT AND HIS COUNSEL DELIBERATELY INTIMIDATED STATE WITNESS GEORGE DUDLEY.

It is axiomatic that a prosecutor is entitled to wide latitude in closing argument, and all legitimate argument by a prosecutor should be encouraged. Paramore v. State, 229 So.2d 855 (Fla. 1969); Wingate v. State, 232 So.2d 44 (Fla. 3rd DCA 1970); Washington v. State, 86 Fla. 533, 98 So. 605 (Fla. 1924). In the case at bar, Appellant objected to the following statement made by the prosecutor during closing argument:

> "That leaves them with George. And looking at George, folks use your common sense in evaluating his testimony. George is dumb. Absolutely dumb. And that's being nice about it. I don't think he intentionally came in here and lied to anybody. The louder he talked to George and the more he yelled at George, the more he slunk. And if you noticed, they put the defendant right back there. They didn't leave him over there. They put him right over there where George could see him, Where Larry could see him and where George could see him, trying to intimidate him." (R. 1172-1173)

The trial court overruled the objection, finding the statement to be fair comment on the evidence presented (R. 1174).

While there is no reflection in the record of George Dudley's testimony to substantiate the facts set forth in the prosecutor's statement, there seems to be little question that the actions referred to did occur (R. 1173, 1174). Since there was a factual basis for the comment in question, the trial court could properly overrule the objection. See Blair v. State, 406 So.2d 1103 (Fla. 1981); Darden v. State, 329 So.2d 287 (Fla. 1976); Lewis v. State, 377 So.2d 640 (Fla. 1980).

> "The law requires a new trial only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done or in which the comment is unfair." Darden, supra. at 289

In Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974) the Supreme Court indicated some criteria in determining whether a remark is so prejudicial as to deny a defendant a fair trial. Such factors include:

(1) Whether the remark was a brief episode or a persistent error,

(2) Whether the comment introduced misleading evidence or omitted evidence valuable to the accused,

(3) Whether the trial court instructed the jury to disregard the comment,

(4) The strength of the government's case,

(5) Whether the comment was made in response to remarks made by defense counsel,

(6) Whether there was an objection to the comment, and

(7) The intent of the prosecutor and whether the prosecutor retracted the comment.

In considering the totality of the record, sub judice, it is evident that the prosecutor's remark, even if improper, was not so prejudicial as to deny Appellant a fair trial.

Appellant also argues that the prosecutor's comment that she did not believe George Dudley intentionally came in and lied to anybody (R. 1173) was improper. Appellee would respectfully submit that no objection was made to this statement (R. 1173-1174).

This Court and others have ruled on a number of occasions that failure to object to an allegedly improper comment waives the objection and the matter cannot be raised on appeal. State v. Jones, 204 So.2d 515 (Fla. 1967); Songer v. State, 322 So.2d 481 (Fla. 1975); Thomas v. State, 326 So.2d 413 (Fla. 1975); Gansey v. State, 382 So.2d 838 (Fla. 1978) and Clark v. State, 363 So.2d 331 (Fla. 1978).

Sub judice, Appellant's stated reasons for his objection revolved around the premise that the entire comment suggested Appellant had tried to intimidate Dudley (R. 1173-1174). Appellant's argument that the statement contains a comment on Dudley's credibility is not cognizable on appeal as it was not raised below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Additionally, the impact of the statement was diminished by the prosecutor's admonishment to the jury that they did not have to accept Dudley's testimony "hook, line and sinker". (R. 1176). It cannot be said

that this comment, when evaluated in the entire context of the record created reversible error. Compare Francis v. State, 384 So.2d 967 (Fla. 3rd DCA 1980); Maggard v. State, 399 So.2d 976 (Fla. 1981).

Finally, Appellee rejects Appellant's contention that the prosecutorial comments contained at Record pages 1162 and 1167 could constitute improper comments on Appellant's failure to present evidence but would agree that this point has been waived by Appellant's failure to object at trial. See e.g. Maggard, supra.; Cumbie v. State, 378 So.2d 1 (Fla. 1978).

Appellee would submit that there has been no showing that any of the allegedly improper comments complained of materially contributed to the conviction sub judice, Zamot v. State, 375 So.2d 881 (Fla. 3rd DCA 1981). Nor were they so harmful or materially tainted as to require a new trial. Smith v. State, 354 So.2d 477 (Fla. 3rd DCA 1978). For the foregoing reasons, Appellant has failed to demonstrate reversible error on this point.

ISSUE II

THE COURT BELOW ERRED IN FAILING TO GRANT LARRY BROWN MEANINGFUL RELIEF DUE TO THE STATE'S FAILURE TO COMPLY WITH FLORIDA'S DISCOVERY RULES, AND INALLOWING THE STATE TO INTRODUCE THE HEARSAY TESTIMONY OF GEORGE DUDLEY. (As stated by Appellant).

At trial, Detective San Marco revealed that George Dudley had identified a photograph of "Ricky", the alleged third co-perpetrator of the instant crimes and it then became clear that Ricky's last name was Brown (R. 852, 853, 857). The trial judge conducted a Richardson[1] inquiry, determined that the State had inadvertently committed a substantial discovery violation, and excluded the photopack and Ricky's last name from evidence (R. 887-888). The trial judge subsequently declined to exclude George Dudley's testimony about the family relationship between Appellant and Ricky Brown since the defense could have discovered this information during the deposition of George Dudley (R. 918, 920-922).

Appellant now makes a four-fold argument that he was harmed by the failure to disclose Ricky's full name, the denial of a continuance to locate Ricky, the denial of a continuance prior to George Dudley's cross examination and the admission of Dudley's testimony about the relationship between Ricky and Appellant. Appellant has failed to demonstrate, however, that he

1/ Richardson v. State, 246 So.2d 771 (Fla. 1971)

was, in fact prejudiced by any of these alleged errors. See Antone v. State, 410 So.2d 157 (Fla. 1982).

It is axiomatic that the failure to comply with a rule of discovery should be remedied in a manner consistent with the breach. Ziegler v. State, 402 So.2d 365 (Fla. 1981); King v. State, 355 So.2d 831 (Fla. 3rd DCA 1978). Sub judice the trial court reacted to the alleged discovery violation by excluding the undisclosed evidence,to wit: Ricky's last name and the photopack. It is apparent from the record that the information regarding Ricky's familial ties with Appellant was available to the defense through the deposition of George Dudley and the State should not be penalized for the failure to specifically reveal this information. See Breedlove v. State, 413 So.2d 1 (Fla. 1981).

Appellant has also failed to show that the trial court abused its discretion in denying the requested continuances. See King, supra.; Mills v. State, 280 So.2d 35 (Fla. 3rd DCA 1973). Nothing in the record supports the conclusion that Ricky, if located, would have sacrificed his Fifth Amendment privilege to testify in this cause. Nor is there the slightest reason to believe Ricky had information which would prove exclupatory to Brown. See Perry v. State, 395 So.2d 170 (Fla. 1981). Likewise, given the State's interest in locating the third perpetrator of the instant crimes and its lack of success in doing so (R. 897-898), it is evident that the requested continuance would have been pointless. Compare Valle v. State, 394 So.2d 1004 (Fla. 1981).

It should be noted that while the trial court initially agreed to an overnight continuance proceeding Appellant's cross-examination of George Dudley (R. 908), the court reversed its position following argument by the State that Dudley was not going to testify to facts previously unavailable to the defense (R. 908, 912). This ruling was supported by the Court's reviewing of Dudley's deposition and inquiry of Dudley, which revealed that Dudley's information about Ricky's relationship with Appellant was available to Appellant at the deposition (R. 918-920). Appellant has never demonstrated the manner, if any, in which he was allegedly hindered in his cross-examination of Dudley as a result of the denial of his motion for continuance. Under these circumstances it is apparent that the court was well within the limits of its discretion in denying this continuance. Breedlove, supra.; King, supra.

Lastly, Appellant argues that Dudley's testimony that Ricky was Appellant's stepson should have been excluded as hearsay.[2] Assuming arguendo that the testimony was indeed, hearsay, it is apparent that any error in its admission was harmless. Appellant had already been clearly linked to the instant crimes by George Dudley and by the testimony of Valerie Lambert and others establishing Appellant's possession and sale of the victim's tele-

2/ While Appellant raised the hearsay issue at trial (R. 917-918) the main thrust of his objection to the testimony was directed to the alleged discovery violation by the State. See e.g. (R. 918-923) Whether the grounds for the hearsay objection were fully developed so as to give the trial judge an adequate opportunity to rule on that basis is questionable. See Lucas v. State, 376 So.2d 1149 (Fla. 1979)

vision. The record fails to reflect any harm to the substantial rights of Appellant as a result of this testimony and for this reason error, if any, does not warrant reversal. Olsen v. State, 75 So.2d 281 (Fla. 1954); Clark v. State, 378 So.2d 1315 (Fla. 3rd DCA 1980).

ISSUE III

THE TRIAL COURT ACTED PROPERLY IN DENYING BROWN'S MOTION TO DISMISS COUNT II OF THE INDICTMENT, WHICH FAILED TO ALLEGE THE FACTUAL ELEMENTS OF THE ASSAULT MADE UPON THE VICTIM ANNA JORDAN.

Ordinarily it is sufficient to lay the charge in essentially the language of the applicable statute. State v. Burkett, 344 So.2d 868 (Fla. 2d DCA 1977). "Indictments and informations should be upheld if they are in substantial compliance with the law." State v. Barnett, 344 So.2d 863, 865 (Fla. 2d DCA 1977). "Where an information refers to a statute and tracks it language, it is generally held sufficient." State v. DiGuillio, 413 So. 2d 478, 479 (Fla. 2d DCA 1982).

In McClamrock v. State, 374 So.2d 1076 (Fla. 2d DCA 1979) the Second District Court of Appeal affirmed a conviction of aggravated assault where the information did not set forth the factual elements of assault. The court reasoned that "the information contained sufficient allegations to properly place the Appellant on notice of the charge, particularly where the elements of assault are defined in the statute. Relying on Florida Statutes and the Rules of Criminal Procedure, the Appellant could inform himself in more detail as the charge." Id. at 1077. But see conta: Lindsey v. State, 416 So.2d 471 (Fla. 4th DCA 1982); Oliveria v. State, 417 So.2d 1004 (Fla. 4th DCA 1982).

Even assuming arguendo the information was somehow deficient "an information which imperfectly alleges an element of a crime but does not wholly fail to allege that element is not fundamentally deficient and must be attacked by a motion to dismiss or the defect is deemed harmless. Even if attacked by a motion to dismiss, denial of the motion may be harmless error if the defendant can show no prejudice in his defense." Green v. State, 414 So.2d 1171, 1173 (Fla. 5th DCA 1982).

Sub judice Appellant had access to the medical examiner's report describing the victim's injuries and deposition testimony of George Dudley regarding the criminal events that occurred in the victim's home.[3] This being the case, Appellant was clearly aware of the factual matters comprising the charged assault. Additionally there has been no allegation that the evidence adduced at trial was insufficient to support the verdict rendered, or that the jury was not fully and completely instructed on the elements constituting assault. Compare Mitchell v. State, 407 So.2d 343 (Fla. 4th DCA 1981). For the foregoing reasons, it is clear that the trial judge properly denied Appellant's motion to dismiss Count II of the information.

3/ While there is no transcript of the Dudley deposition in the record, it is reasonable to assume that the deposition contained substantially the same material revealed at trial. Except as noted in Issue II infra. Appellant did not claim surprise at Dudley's trial testimony.

ISSUE IV

APPELLANT RECEIVED AN ADEQUATE STATEMENT OF PARTICULARS FROM THE STATE AND THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MORE DEFINITE STATEMENT.

Appellant argues that the State should have been required to furnish a statement of particulars which revealed the exact manner in which the victim was killed, the facts showing premeditation, whether the state intended to prove theft or sexual battery, and the facts establishing the theft or sexual battery. Rule 3.140(n), Florida Rules of Criminal Procedure provides in pertinent part:

> "...Such statement of particulars should specify as definitely as possible the place, date and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney..."
> Rule 3.140(n), Fla. R. Crim. P. (Emphasis supplied).

In response to Appellant's request for a more definite statement as to the cause of death the prosecutor stated:

> "Judge, we've alleged, with specificity, in the Indictment, that asphyxiation was caused by either a binding to the neck and/or a gag placed in the mouth. We believe there is ample evidence that will be brought out at trial that would support either theory...
>
> All of the evidence which we are going to be presenting at trial was available through discovery, either through statements of wit-

> nesses or through depositions or through physical evidence from the crime scene." (R. 207)

There has been no suggestion that the State had the ability to provide more detailed information as to the mode of death. Rule 3.140(n) requires only that the requested particulars be as detailed as possible. State v. McGregor, 409 So.2d 504 (Fla. 4th DCA 1982); State v. Bandi, 338 So.2d 75 (Fla. 4th DCA 1976); Williams v. State, 344 So.2d 927 (Fla. 3rd DCA 1977).

Appellant's argument that he was entitled to know the facts supporting premeditation, which offense the State planned to use to satisfy the intent requirement of the burglary offense and the facts to be used to prove that intent is without merit, and amounts to nothing more than an attempt to require the State to prove its entire case, on paper, prior to trial.

Appellant correctly notes that the State, having charged premeditated murder is entitled to prove either premeditated or felony murder. Adams v. State, 412 So.2d 850 (Fla. 1982). The rules of criminal procedure require disclosure of relevant evidence. Except as noted supra. in Issue II there is no suggestion that the rules were not fully complied with. Appellee is not required to disclose its theory of the entire case. Likewise, the burglary indictment is in compliance with §810.02, Florida Statutes (1981). The charge specifies that Appellant intended to commit theft or sexual battery. This is in keeping with the requirement that a particular offense be charged. Compare Rozier v. State, 402 So.2d 539 (Fla. 5th DCA 1981).

Appellee would submit that the premeditation and burglary questions are not preserved for appellate review. This information was requested in Appellant's initial motion for statement of particulars (R. 82-84). The State responded to this motion (R. 87) and Appellant requested additional particulars (R. 114-115). The request for additional particulars and the argument on this motion deal only with the mode of death (R. 114-115, 294-298). It is reasonable to assume, from the state of the record, that Appellant abandoned his demand for the information regarding premeditation and the burglary, and is thus barred from seeking appellate review of this issue. Steinhorst, supra.; Castor v. State, 365 So.2d 701 (Fla. 1978).

In summary, the trial court recognized that Appellee had complied with Rule 3.140(n) as completely as possible. It was not error to fail to grant a request for more definite statement, when in fact, such information was unavailable.

ISSUE V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR JURY VERDICT FORMS WHICH WOULD INDICATE, IF THE JURY FOUND APPELLANT GUILTY OF FIRST DEGREE MURDER, WHETHER THE VERDICT WAS BASED UPON A FINDING OF PREMEDITATION OR FELONY MURDER.

Appellant requested jury verdict forms which would reflect whether the jury believed him to be guilty of premeditated or felony murder. Appellant's argument in support of this instruction is plausible only if one assumes that Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982) precludes the imposition of a death sentence on a defendant guilty of felony murder. Enmund, supra. does not preclude the imposition of a death sentence on a felony murderer, See e.g. Ruffin v. State, 420 So.2d 591 (Fla. 1982), but rather suggests that death may be inappropriate for a defendant who neither killed, attempted to kill, nor intended or contemplated that life would be taken. Enmund, supra. at 73 L.Ed. 2d 1154. Additionally there is no Constitutional or court imposed rule of law which would mandate the forms requested by Appellant.

The applicability of Enmund, supra. can clearly be determined by the sentencer and the reviewing Court based on trial record. Forcing the jury to elect between two theories of first degree murder would provide no demonstrable assistance in determining whether the Enmund criteria are satisfied. The trial judge did not err in declining to give the requested jury instruction and choosing instead to follow the standard jury instructions.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN IMPOSING A LIFE SENTENCE ON APPELLANT FOLLOWING HIS CONVICTION FOR BURGLARY.

It should be noted that on June 10, 1983 a supplemental record was transmitted to this Court containing a transcript of Appellant's sentencing on the burglary charge. (R. 1404-1405). This effectively resolves Appellant's contention that no sentencing hearing was conducted on this charge and the record reflects that the written sentence conforms with the oral pronouncement (R. 1404, 1405, 206, 207).

Appellant was charged in a two-count indictment with premeditated murder and burglary (R. 28-29). The jury returned a guilty verdict on each count (R. 180-181). Appellee recognizes the holding in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981) and its applicability in a felony murder situation, however, the instant record contains ample support for the conclusion that Appellant committed premeditated murder.

Premeditation is the fully formed and conscious desire to take a human life, which must be formed after reflection and deliberation. Such premeditation may exist for only a few moments before the offense. McCutchen v. State, 96 So.2d 152 (Fla. 1957). It may be inferred from the circumstances surrounding the homicide and may be established by circumstantial evidence. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); Weaver v. State, 220 So.2d 52

(Fla. 2d DCA 1969) and Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965).

The record in the instant case reflects that Appellant delibertely forced his victim to the floor and bound her about the neck (R. 930-931, 963). Surely, if the only objective had been to subdue rather than asphixiate the victim, an eighty-one (81) year old woman, the tying of her hands would have sufficed. The entire circumstances of the crime support the conclusion that the jury verdict could be based on the rational belief that Appellant was guilty of premeditated murder and therefore, Appellant could properly be sentenced for both burglary and murder.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT TO DEATH SINCE THE WEIGHING PROCESS DID NOT INCLUDE INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND/OR EXCLUDE EXISTING MITIGATING CIRCUMSTANCES.

Appellant has divided this issue into eight subcatagories for clarification of the issues involved. Appellee will treat these issues in the same manner raised by Appellant.

A.

THE TRIAL COURT DID NOT CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

The trial court entered a written order detailing six statutory aggravating circumstances which he found applicable in the case at bar (R. 209-211). Although the trial judge mentioned that Appellant had led a parasitic existence at sentencing, the record belies the contention that he treated this as an aggravating factor (R. 278-280; 209-211).

Appellant's reliance on Miller v. State, 373 So.2d 882 (Fla. 1979) is misplaced. In Miller, the trial judge improperly relied on the possibility of parole and the defendant's allegedly incurable and dangerous mental illness as the determining factors is imposing the death penalty. The trial court in Miller utilized these impermissable aggravating circumstances to tip the scale in a case where three statutory aggravating factors and three mitigating factors were found to exist.

In the case at bar, the record supports the trial court's finding of two statutorily enumerated aggravating circumstances and no off-setting mitigating circumstances. The determination by the trial court that death is the appropriate sentence is also supported by the presumption that death is the proper sentence where at least one proper aggravating circumstance exists and no overriding mitigating circumstances are found. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den. 416 U.S. 943 (1974); Smith v. State, 407 So.2d 894 (Fla. 1981).

B.

THE TRIAL COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT BROWN WAS ON PAROLE FOR BURGLARY AT THE TIME OF THE INSTANT CAPITAL OFFENSE.

It is well-settled that the sentencing judge can consider aggravating factors not presented to the trier of fact. White v. State, 403 So.2d 331 (Fla. 1981); Sawyer v. State, 313 So.2d 680 (Fla. 1975); Spaziano v. State, 433 So.2d 508 (Case No. 50,250, Fla. 1983) [8 FLW 178]. It is equally clear that a defendant on parole at the time of a capital offense is considered to be under a sentence of imprisonment for the purposes of §921.141(5)(a), Florida Statutes,; White, supra. at 337.

The information that Appellant was on parole at the time of the instant crime, was not challenged by trial counsel below (R. 272-273), nor is its veracity challenged herein. This Court has again suggested in Spaziano, supra. that information regarding a defendant's prior criminal convictions con-

tained in a pre-sentence investigation may be considered by the sentencer. Id. at 8 FLW 179. See also White, supra. at 339, 340. Error in the imposition of this factor has not been demonstrated.

C.

THE TRIAL COURT PROPERLY FOUND THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A FELONY INVOLVING THE USE OF OR THREAT OF VIOLENCE TO THE PERSON.

It is uncontroverted that at the time of his sentencing Appellant had been convicted of aggravated battery. The fact that the incident giving rise to the battery conviction occurred subsequent to the instant crime is insignificant. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Ruffin v. State, 397 So.2d 277 (Fla. 1981). Appellant did not argue below that his conviction for second degree arson did not involve the use of or threat of violence to the person, and should not be permitted to do so at this late date. Ray v. State, 403 So.2d 956 (Fla. 1981). In any event, Appellee would submit that any arson satisfies the criteria of threat of violence to the person.

The trial court was clearly correct in applying this aggravating factor.

D.

THE TRIAL COURT PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED DURING THE COURSE OF A BURGLARY AND RAPE.

The record below clearly demonstrates that the victim was sexually assaulted during the capital felony. Appellee would ask this Court to summarily reject the Appellant's contention that

this factor may not be applied to a co-defendant who did not, in fact, rape, but who was in fact present and actively participating in the criminal episode. Cf. Ruffin v. State, 420 So. 2d 591 (Fla. 1982); Hall v. State, 420 So.2d 872 (Fla. 1982).

The argument also being made is that the use of underlying felonies in this case, burglary and rape, both to support a felony murder conviction, and as an aggravating circumstance in the penalty phase violates the United States Constitution on equal protection and due process grounds. The viability of Section 921.141(5)(d), Florida Statutes (1981) is well recognized by this Court. See e.g. State v. Dixon, 283 So. 2d 1 (Fla. 1973); White, supra. Appellant acknowledges that the substance of this argument was firmly rejected by this Court in White, supra, but urges a reevaluation in light of Enmund v. Florida, supra.

Enmund, supra. revolves around the premise that one who neither participated in or intended that a murder take place may not be sentenced to death merely on the basis of his involvment in the underlying felony. The Enmund court mentioned in passing that the trial court had found as an aggravating circumstance that the murders were committed during the course of a robbery, and did not question the propriety of this finding. Enmund at 73 L. Ed. 2d 1144.

In White, supra. this court considered the continuing validity of Section 921.141(5)(d), Florida Statutes (1981) in light of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), stating:

> "...in striking down Ohio's death penalty statute because it limited consideration of relevant mitigating circumstances to those statutorily listed, the Court specifically distinguished Florida's death penalty statute by noting that it permitted the sentencer to consider any aspect of the defendant's character and record or any circumstance of his offense as an indipendently mitigating factor. Id. at 606-607, 98 S.Ct. at 2965-66. Thus at least implicitly, the Court recognized the continuing vitality of Proffitt v. State, 428 U.S. 242, 96 S.Ct., 2960, 49 L.Ed. 2d 913 (1976), upholding the constitutionality of Florida's death statute, in the context of a claim which was similar to the eighth amendment claim raised by the defendant in the instant case." White, supra. at 336.

This reasoning and Section 921.141(5)(d), Florida Statutes (1981), remain viable. The trial court's finding that the murder was committed while Appellant was engaged in the crimes of robbery and kidnapping was proper.

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E.

THE TRIAL COURT PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

The proscription against the "doubling up" of aggravating factors contained in Provence v. State, 337 So.2d 783 (Fla. 1976) cert. den. 431 U.S. 969 (1977) is intended to prohibit the imposition of two aggravating factors based on the same aspect of criminal conduct. Sub judice Appellant was charged with burglary with the intent to commit theft or sexual battery. The

record amply supports the conclusion that both the theft and the sexual battery occurred. Under these circumstances, the trial court could properly find that the murder was committed during a burglary[4] and for pecuniary gain. Quince v. State, 414 So.2d 185 (Fla. 1982).

F.

THE TRIAL COURT PROPERLY FOUND THAT THE CAPITAL FELONY WAS HEINOUS, ATROCIOUS AND CRUEL.

In his written order setting forth the factors in aggravation and mitigation in the instant case the trial court stated:

> "5. That the capital felony was especially heinous, atrocious [sic] and cruel in that the victim, an eighty-one (81) year old semi-invalid woman, was beaten, raped and found choked to death. The evidence shows that the victim's hands had been tied behind her back and she had been strangled and a gag had been placed in her mouth. The cause of death having been asphyxiation. The medical examiner was not able to positively indicate whether it came about as a result of either the garrote or the gag that had been placed in the victim's mouth for the purpose of silencing her so that the defendant and his fellow perpetrators could accomplish their evil deeds (R. 210)

The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be

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4/ As argued in subsection D, supra., Appellee rejects the suggestion that Appellant may escape culpability for the rape because he may not have personally committed the act.

disturbed unless there is a lack of competent evidence to support such a finding. Sireci v. State, 399 So.2d 964 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Appellee is in agreement with Appellant's definition of heinous, atrocious and cruel as set forth in State v. Dixon, supra. Appellee disagrees with Appellant's assertion that this extremely brutal rape-murder does not fit the definition of heinous, atrocious and cruel.

"Heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked or vile; "cruel means designed to inflict a high degree of pain with utter indifference to the duffering of others. The facts of this case, as set forth in the trial courts order, support the determination that these definitions have been met.

This is not a case as in Maggard v. State, 399 So.2d 973 (Fla. 1981) or Cooper v. State, 336 So.2d 1133 (Fla. 1976), wherein the victim died swiftly from gunshot wounds evidencing a lack of pain. The facts of this case demonstrate a conscienceless and pitiless crime which is unnecessarily tortuous to the victim.

In McCrae v. State, 395 So.2d 1145 (Fla. 1981), a factually similar case, this Court upheld the imposition of the death penalty over a jury recommendation of life wherein the defendant brutually beat a 67 year old woman to death and raped her either shortly before or immediately after her death. The severity of injuries inflicted in the case sub judice are comparable to those inflicted by McCrae upon Mrs. Mears. Likewise one can easily

imagine the emotional anguish to which this elderly woman was subjected as her home was broken into and she was beaten, bound and assaulted. Compare Knight v. State, 338 So.2d 201 (Fla. 1979); Ruffin v. State, 397 So.2d 277 (Fla. 1981); McCrae, supra. In finding the murder to be especially heinous, atrocious or cruel, this Court recognized in McCrae that "[t]he killing in this case falls squarely within this category when viewed in the context of prior decisions of this Court where we have approved a finding of this aggravating circumstance." 395 So.2d at 1153.

It is simply inconceivable that the brutual beating death of an eighty-one (81) year old woman can be considered "the norm" of capital felonies.

G.

THE TRIAL COURT PROPERLY FOUND THE MURDER TO BE COLD, CALCULATED AND PREMEDITATED.

The trial court made the following findings of fact in determining that the instant murder was committed in a cold, calculated and premeditated manner:

> "6. Based upon the facts elicited and the manner in which death was inflicted, it is apparent this homicide was committed in a cold and premeditated manner without any pretense of moral or legal justification, in that the victim was in her home and the evidence showed that she had made every effort to properly secure her residence prior to the defendant breaking and entering, taking her by surprise, beating her and either choking or strangling her to death before leaving the home. The medical evidence further showed that prior to leaving the victim's home that the gag had been removed from her as was evidenced by the fact that it was found several feet from her body and there was evidence of fingernail

> scratches on the roof of her mouth and as her hands were tied behind her back, it is clear that this was done by the defendant or one of the perpetrators of this offense and showed further the callous, premeditated manner with which the crime was accomplished and the defendant's intent to insure that the victim was dead before departing the grisly scene."(R. 210-211).

Combs v. State, 403 So.2d 418 (Fla. 1981) demonstrates that a murder can be heinous, atrocious and cruel and also cold, calculated and premeditated. The cold and calculated aspect of the murder more nearly relates to the killer's intent and state of mind when the crime is committed. See Combs, supra. The heinous aspect relates more to the manner in which the crime is done - method, i.e., causing the victim unnecessarily prolonged, extreme pain.

There is competent evidence of the cold and calculated nature of this crime, therefore the trial judge's finding should not be disturbed.

H.

FACT THAT PREPARED ORDER DID NOT DISCUSS NON-STATUTORY MITIGATING FACTORS DID NOT SHOW THAT TRIAL JUDGE DID NOT CONSIDER SUCH EVIDENCE PRESENTED AT PENALTY PHASE OF APPELLANT'S TRIAL.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 37 L.Ed. 2d 973 (1971), the United States Supreme Court held that Ohio's death penalty statute violated Eighth and Fourteenth Amendments to the United States Constitution because the

tatute restricted the sentencing judge's consideration to the statutory list of mitigating factors. Florida's death penalty statute has been found to comply with the dictates of Lockett v. Ohio, supra. See Songer v. State, 365 So.2d 696 (Fla. 1978).

The aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. As the Supreme Court explained:

> While the various factors to be considered by the sentencing authority do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitratiness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242 at 258/96 S.Ct. at 2969, 49 L.Ed. 2d at 926 (1976).

The United States Supreme Court has declared constitutional on its face, Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances. The Supreme Court stated:

> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed. Id. at 258, 96 S.Ct. at 2969.

In the instant case, Appellant contends that the trial judge erred in failing to consider and include several mitigating circumstances concerning his excellent character in the sentencing weighing process. Appellant cannot prevail on this point since in essence his argument is reduced to an observation that the trial judge should have given more weight to some of the mitigating factors than he did. The trial judge is not compelled to give the weight desired by the Appellant to such matters. See Hargrove v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State 376 So.2d 1149 (Fla. 1979); Smith v. State, 407 So.2d 894 (Fla. 1981); Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

Because the trial judge discussed only one mitigating circumstance, Appellant suggests that none of the other mitigating evidence was even considered by the Court. This is pure speculation on Appellant's part. See Palmes v. State, 397 So. 2d 648 (Fla. 1981). Appellant was in no way restricted in presenting mitigating evidence to the court. Cf. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed. 2d 1, 102 S.Ct. 869 (1982). There is no requirement that the trial judge state what evidence he considered and then rejected. He need only set out what circumstances he finds to exist. Section 921.141(3), Florida Statutes.

Appellant's argument is totally without merit.

SUMMARY

Even if any one of the trial judge's six findings of statutory aggravating circumstances were to be rejected for any

reason, the remaining aggravating factors suffice to support the imposition of death since there are no mitigating factors present. See Zeigler v. State, 402 So.2d 365 (Fla. 1981); Brown v. State, 381 So.2d 890 (Fla. 1980); Armstrong v. State, 399 So.2d 952 (Fla. 1981); Ford v. State, 374 So.2d 496 (Fla. 1979); Elledge v. State, 345 So.2d 998 (Fla. 1977); Aldridge v. State,351 So.2d 945 (Fla. 1977); Shriner v. State, 386 So.2d 525 (Fla. 1980).

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT TO DEATH EVEN THOUGH CO-DEFENDANT GEORGE DUDLEY HAD NEGOTIATED A LIFE SENTENCE.

The imposition of a death sentence is not dependent on the sentence of a co-defendant, however, a co-defendant's sentence is one factor, along with evidence of complicity which may be considered. Each case should be decided on its own facts and circumstances. Witt v. State, 342 So.2d 497 (Fla. 1977); Malloy v. State, 382 So.2d 1190 (Fla. 1979).

In the case at bar there is no evidence that co-defendant George Dudley was anything more than a slow-witted, minor participant in the crimes charged. Also absent from the record is any evidence that Dudley took any part in the physical atrocities committed on the victim. On the other hand, Dudley's testimony revealed that Appellant, at a minimum, struck and bound the victim and appeared to be trying to strangle her (R. 930-931, 963). Appellant planned the crime (R. 925) and took charge of the disposition of the stolen property (R. 930, 977-978).

In Witt, supra., this Court upheld the imposition of the death penalty on Witt, noting the disparity in culpability between Witt and his co-defendant who acted under Witt's domination and suffered mental problems. Witt, supra. at 501. Unlike Slater v. State, 316 So.2d 539 (Fla. 1975) where the triggerman received only a life sentence, and Malloy, supra., where equally

culpable co-defendants received disparate sentences, the distinction in the instant case is supported by the record. Compare also Messer v. State, 330 So.2d 137 (Fla. 1976). For the foregoing reasons, the trial judge did not err in imposing a more severe sentence on Appellant than the one received by George Dudley.

ISSUE IX

SENTENCING LARRY DONNELL BROWN TO DEATH WHEN IT WAS NOT PROVEN THAT HE INTENDED TO KILL ANNA JORDAN CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT. (As stated by Appellant)

Citing Enmund v. Florida, supra., Appellant claims that the death penalty cannot be imposed because he did not actually and intentionally kill the victim. In Enmund, supra. the United States Supreme Court held that Florida's death penalty statute cannot be constitutionally imposed upon a defendant who did not kill, attempt to kill, intend to kill or intend that lethal force be used during the underlying felony.

Enmund is clearly distinguishable from the instant cause. Enmund was not present at the scene of the killing nor did he intend a killing. Enmund was only an aider and abettor to the underlying felony. In contrast, Appellant was present during the killing, had initiated the underlying felony, affirmed after the crime that he had "killed one white bitch"(R. 1010); and finally, made no effort to either depart or interfere with the killing. Appellant simply continued on with the joint venture. Cf. Ruffin, supra.; Hall v. State, 420 So.2d 872 (Fla. 1982); Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983).

The evidence as presented at trial rebuts Appellant's contention that he did not intend to take life, and in fact, as discussed in Issue VIII, supra., supports the conclusion that Appellant conmitted premeditated murder. Appellant's judgment and sentence should be affirmed.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.
(As stated by Appellant)

Relying on Tedder v. State, 322 So.2d 908 (Fla. 1975), Appellant contends that the lower court erred in overruling the jury recommendation.

In response, we submit first that this Court should revisit Tedder and second, that even under Tedder standards, the jury override was not erroneous.

This Court Should Revisit Tedder.

Section 921.141(2), Florida Statutes, reduces the jury's role to that of advising the trial court. It is manifest that the purpose of seeking a jury recommendation is so that the trial court can receive the benefit of the "conscience of the community"[5] in considering the appropriate sentence. But this Court has reiterated that in a capital case it is the judge who is the sentencer - not the Supreme Court, nor the jury, but the trial judge.[6] It is the judge's findings, not those of the jury, that must withstand scrutiny by this Court "...(n)otwithstanding the recommendation of a majority of the jury." See Section 921.141(3) Florida Statutes.

5/ McCaskill v. State, 344 So.2d 1276 (Fla. 1977

6/ Lamadline v. State, 303 So.2d 17 (Fla. 1974); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

Continued adherence to Tedder results in the jury becoming the sentencer in capital cases, since the judge is considered to have erred if he does not give sufficient weight to the jury recommendation. The fact is that under Tedder, the jury recommendation of life cannot be rejected by the judge unless the evidence is so clear and convincing that reasonable minds could not differ. If the jury's recommendation cannot be rejected except where that test is met, then in essence the jury becomes the sentencer. When the jury recommends life, the focus is then on that recommendation rather than on the weight given by the judge to the aggravating and mitigating circumstances. Consequently, it does not matter to what degree the trial judge finds the aggravating circumstances outweigh the mitigating. Imposition of the supreme penalty is improper unless it can be determined that the jury acted irrationally under the circumstances.

The jury's recommendation should remain what it was meant to be, a sample of the counscience of the community with respect to the particular case. By overemphasizing the jury recommendation, resort to speculation unsupported by the appellate record will result. The judge's written findings and reasons for imposing the death penalty is not subject to surmise or guess work - the jury's will be. By concentrating on those findings and not on whether the jury recommendation should be overridden, this Court will assume the meaningful appellate review essential to a proper application of the statute.

The Tedder Standards Were Met.

This Court has said that although the jury recommendation is to be accorded great weight, the ultimate decision as to whether the death penalty shall be imposed rests with the judge and that if based on the totality of the circumstances the facts suggesting death are so clear and convincing that no reasonable person could differ, the jury override will be affirmed. Johnson v. State, 393 So.2d 1069 (Fla. 1980); See also Hoy v. State, 353 So.2d 826 (Fla. 1978); Tedder v. State, supra.; Lamadline v. State, 303 So.2d 17 (Fla. 1974); State v. Dixon, 283 So.2d 1 (Fla. 1971).

The State would submit that the totality of circumstances cogently set out in the judge's order separates this case from the norm of capital offenses and justifies affirmance of the jury override. Compare: Barclay v. State, 343 So.2d 1266 (Fla. 1977); Hoy v. State, supra.; Dobbert v. State, 328 So.2d 433 (Fla. 1974); Gardner v. State, 313 So.2d 675 (Fla. 1975); Douglas v. State, 328 So.2d 18 (Fla. 1975); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Johnson v. State, supra.; Sawyer v. State, 313 So.2d 680 (Fla. 1975).

In overriding a jury recommendation, the trial judge must express concern and particular reasons which justify the jury override. Thompson v. State, 328 So.2d 1 (Fla. 1976). The judge did so in this particular case.

In the instant case, the trial judge went to great lengths to set forth the factors which caused his departure from the jury's recommendation (R. 209-41; 278-280).

The trial judge was aware that Appellant had accomplices in the perpetration of his criminal acts; he found that Appellant's participation was of a major consequence to the murder of the victim. The trial judge found six aggravating factors, not all of which were presented to the jury. Cf. Spaziano v. State, ___ So.2d ___ (Case No. 50,250 Fla. 1983); White, supra. Balanced against these factors are no significant mitigating factors. Compare Zeigler v. State, 402 So.2d 365 (Fla. 1981); Spaziano, supra. This is not a case where an equally culpable co-defendant received a lesser sentence. Cf. Malloy v. State, 382 So.2d 1190 (Fla. 1979).

Because the aggravating factors present in the instant case outweigh any possible mitigating circumstances the trial judge did not err in rejecting the jury's recommendation of life imprisonment.

ISSUE XI

THE TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE FOLLOWING A JURY RECOMMENDATION OF LIFE IMPRISONMENT WAS PROPER AND DID NOT PLACE BROWN IN DOUBLE JEOPARDY OR VIOLATE HIS RIGHT TO DUE PROCESS AND IS NOT CRUEL AND UNUSUAL PUNISHMENT.

A. Double Jeopardy

As noted by Appellant, the double jeopardy issue raised herein was decided adversely to his position in Douglas v. State, 373 So.2d 893 (Fla. 1979). This Court recently reconsidered this issue in light of Bullington v. Missouri, 451 U.S. 430 (1981); in Spaziano v. State, ___ So.2d ___ (Fla., Case No. 50,250, 1983), 8 FLW 178, and has once again resolved this issue adversely to Appellant's position. Appellant has made no argument herein which distinguishes Spaziano, supra. from the instant case, and thus Spaziano, supra. is controlling authority on this point.

B. Due Process

Nothing contained in the Due Process Clause of the Fourteenth Amendment mandates written findings of fact by the jury in capital cases. The standard promulgated by this Court in Tedder v. State, supra. is sufficient to determine the correctness of the trial court's decision to reject a jury recommendation of life. The mandate of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972) requires that the discretion of the jury be channelled; it does not require that it be etched in stone or that the trial court be conclusively bound by their recommendation.

C. Cruel and Unusual Punishment

Appellant's Cruel and Unusual Punishment argument is also unpersuasive. There is no constitutional right to jury sentencing in capital cases. Westbrook v. Balkcom, ___ U.S. ___, 66 L.Ed. 2d 298 (1980) [Justice White dissenting from the denial of certiorari].

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests that the Judgment and Sentence of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert F. Moeller, Assistant Public Defender, Courthouse Annex, 3rd Floor, Tampa, Florida, 33602, this 24th day of June, 1983.

M. Ann Garrison
Of Counsel for Appellee