IN THE SUPREME COURT OF FLORIDA

DOUGLAS JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 63,043

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" will be used to designate the record on appeal. The symbol "SR" will be used to designate the supplemental record containing the pre-sentence investigation. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below. The Appellee respectfully notes the following omissions or areas of disagreement.

1. On August 11, 1981, a hearing was held on a motion for continuance requested by Appellant and his co-defendant, Aubrey Livingston.[1/] The trial court granted the motion but expressed concern that the request for continuance came six days before trial (R. 63-64). On October 14, 1981, five days before trial, Appellant filed a second motion for continuance (R. 1656). A hearing was held on the motion on October 15, 1981. In the written motion, counsel for Appellant, alleged that on August 17, 1981, he had suffered a head injury which required him to take prescribed medication that had side-effects of slurred speech and drowsiness. Counsel stated that his medication had tripled and that he had been taking a maximum dose since August 13.[2/] He

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1/ Mr. Livingston's trial was later severed, and his appeal from his conviction and sentence of death is presently pending before this Court in Case No. 61,967.

2/ Due to the discrepancies, Appellee is unsure when the injury to counsel occurred.

stated that it took seven to ten days to adjust to the increased dosage (R 1656).

On October 15, 1981, prior to the court addressing the issue of the continuance, counsel argued more pre-trial motions without any apparent problems (R.115-132). The trial court stated that after listening to counsel elucidate, it seemed contrary to what was in the motion (R.133). Counsel replied that he did not have any problems with thinking or talking, it was just that the medication caused his speech to not be as clear as it should be (R.133). Counsel then stated that he was also asking for a continuance because he had some problems scheduling some witness in Tallahassee (R.133). Counsel concluded by stating "Whatever your Honor wants to do on that." (R.133). Counsel for Appellant and the State were able to agree that the witnesses were ones that they would be stipulating to concerning a report (R.136). The trial court then denied the motion for continuance (R.138).

After hearing more pre-trial motions, including a motion to appoint an associate investigator (R.138-142), counsel for Appellant stated that "in my drowsiness, I am not sure that your Honor clearly ruled on the Motion to Appoint the Associate Investigator" (R.142). The trial court stated that it would clearly rule that it had denied the motion (R.143). Counsel replied that it sounded clear to him (R.143).

Prior to trial on October 19, 1981, a hearing was had on the Appellant's motions to suppress physical evidence and statements (R.154-247). Counsel for Appellant questioned ten witnesses in detail without any apparent problems. He was also able to argue coherently his position to the trial court (R.239-242). The

court denied the motion to suppress (R. 247). Jury selection then began. Prior to jury selection beginning, the trial court asked Appellant's counsel if he was ready to proceed. Counsel replied yes (R. 248). Despite counsel's statement to the jury that if his speech was a little slow or distorted it was because of a little medication he was taking himself (R. 379), counsel was able to conduct a lengthy voir dire (R. 248-461). Although, counsel at one time appeared confused as to his being allowed to further voir dire the prospective jurors, which he alleged was due to his drowsiness caused by the medication (R. 445), he was able to use his remaining peremptory challenges to backstrike a juror whom he had already accepted (R. 445).

Prior to trial beginning, the trial court inquired of Appellant's counsel if he was ready to proceed. Counsel replied yes (R. 469). Counsel reserved opening statement and requested the trial judge to instruct the jury that that was normal procedure (R. 469). During the next days of trial, counsel participated vigorously, making numerous objections, motions for mistrial, and engaging in lengthy cross-examinations. The trial court prior to beginning each session inquired if counsel was ready, to which counsel replied yes (R. 577, 803, 969, 1141, 1332, 1457). When counsel forgot to question Barbara Finney about a certain matter, the trial court allowed her to be recalled as a witness (R. 631-632). The court inquired about counsel's illness. The court instructed counsel to let it know if he had a problem, and stated that if counsel needed to be excused, there would be no problem (R632).

Prior to Shirley Jackson's testimony, the court told Appellant's counsel that if he needed some time for his personal

problems, the court would grant him that, but the court stated that it intended to keep the trial moving (R.772). Counsel then stated that the time was then 5:26 P.M., and because of his physical problems, he would be unable to effectively assist his client under these conditions (R.773). The witness, Mrs. Jackson, however, was very pregnant, and was unable to return to court to testify (R.775, 776). The court found Mrs. Jackson's physical problems to be more acute (R.775). Counsel then moved to withdraw, and the court denied the motion (R.775). The court allowed counsel time to speak to the witness with a court reporter present. As the court noted "let the record reflect that at 5:30 Mr. Cerf came back and he felt appreciably better since he had a court reporter here and he is out taking the witness' deposition right now and the court is waiting for him" (R.777). When counsel returned, the court inquired if his health had improved. Counsel said that he felt better, he was at the court's mercy, and was shook up (R.778). The court stated that no one was at his mercy and that they would not have to stay this late again, but the court felt it had to defer to the witness because of her obvious problems. The court then asked counsel if he was ready to proceed. Counsel replied yes. The court stated "You are not serious with regard to your motion to withdraw, I assume." Counsel replied "Every motion that I make I am serious about." The court denied the motion (R.779). When the jury was back in the courtroom, the court told the jury that Mr. Cerf was not one hundred percent, and apologized to him (R.788).

The affidavit filed by Dr. Haynes in behalf of Mr. Cerf, was not filed until December 1, 1982, more than one year after

trial. Furthermore, the affidavit stated that on January 21, 1982, the doctor certified that Mr. Cerf should not be involved in any trials for about ninety (90) days (R.1765). After the trial, the trial court complimented counsel on the professional manner in which he represented Appellant (R.1518), and noted that counsel was a very effective and capable counsel (R.1567).

2. The trial court prior to trial instructed the jury that if he called someone by their first name, that they were not to interpret this as meaning that the Court was leaning one way or the other (R.426). At the end of trial, the court instructed the jury to disregard anything he may have said or done that made them feel that the court preferred one verdict over another, and reminded the jury that the lawyers were not on trial and that their feelings about them should not influence their decision (R.1428-1429).

3. Juror Kalos stated during voir dire that she had read about the case in the paper and had discussed it with friends (R.307). However, Mrs. Kalos also stated that her opinion was strong at that time, but that she did not know if she was now prejudiced (R.307). Similarly, Juror Houck stated that he had read about the case in the newspapers, watched it on television, as well as discussing it with a police officer friend of his (R.261, 313-314). However, Mr. Houck stated that his mind might be swayed when he heard the other evidence, and then stated that his biggest problem was his concern over his work (R.314). Juror Evans simply stated that he read about the case in the newspaper (R.388), but specifically stated that he had not formed any opinions and would wait until after he heard all the evidence and the court's instru-

ction on the law before forming an opinion (R. 388). Juror Kauffman stated that she had read about the case in the paper and was concerned about the children (R. 361). She stated that although she had a doubt as to her opinion, she understood that whatever appeared in the newspaper had no bearing in the court, that she could be impartial in this case and wait until she had heard all the evidence before reaching a verdict (R. 355).

During voir dire, the trial court and counsel continually asked all the jurors, including these four, if they had a state of mind which would prevent them from acting with impartiality (R. 262, 352, 428), and whether they could render a verdict based on the evidence presented in the courtroom and the law as instructed by the court (R. 266, 269, 318-319, 390). The court and counsel received negative responses to the first question (R. 262, 266, 352, 428), and positive responses to the second (R. 266, 269, 319, 390).

4. When Appellant wanted to backstrike a juror, Mrs. Seery, whom he had already accepted, the trial court permitted him to do so (R. 442, 445). The trial court also told Appellant that once his ten peremptories were used, he would consider more for good cause (R. 399). After questioning more jurors the Appellant accepted the jury, after preserving his objection to the all white jury that was seated (R. 460). The Appellant never requested any more peremptories or stated that he wanted to backstrike. The jury was then sworn in (R. 461).

5. During the discussion on whether to admit the photograph which is State's exhibit "62," Dr. Tate testified that the photograph depicted the "pugilistic" position, in which one of the victims, Edna Washington was found (R. 1074). Dr. Tate had

testified that Edna Washington's body was found in a "puglistic" attitude, which was described as being like a boxer, with the fists up, and which was caused by the body being subjected to extreme heat (R. 1060). The trial court found that the photograph was not all that grizzly, and stated that the court had seen a lot more gruesome pictures (R.1073).

When the fact of Edna Washington's pregnancy was discussed, the trial court instructed the jury on two occasions that the Appellant was not on trial for anything concerning the fetus (R520,1067).

6. Karen Jackson testified that the Appellant came to the home of Walter and Edna Washington, with the co-defendant, Livingston on the night of the murders (R. 822, 828). She told how Appellant forced his way into the bedroom where she was hiding (R 824-825). The photographs of the Washington home corroborated her testimony (R. 704, 707). She testified that she was forced to pack her and the children's belongings, and that Livingston had a gun which he was holding on everyone (R. 826, 828-829). She testified that she took her belongings and put them in the back of Appellant's truck (R. 831). Karen Jackson stated that Appellant told her not to try anything, and she saw Walter Washington and Larry Finney come out of the house with their hands behind their back (R. 832). She and her children were placed in the cab of the camper, the Washingtons and their two children, Finney and Livingston were in the back. She stated that Edna Washington was the last person to get in the back of the camper. The Appellant remained outside until everyone was in (R. 825). This was corroborated by the testimony of Shirley Jackson who saw the Appellant and Karen Jackson putting things in the camper (R. 785) as well as seeing Edna Washington

getting into the back of the camper (R. 786), the Appellant locking the camper and then driving off (R. 788).

Karen Jackson then testified that the Appellant drove the camper into Broward County. The Appellant passed the abandoned car four times before he stopped (R. 837). Appellant got out of the camper and standing behind the camper, talked to Livingston. The Appellant opened the back of the camper and ordered the victims to get into the abandoned car (R. 838-839). Karen Jackson heard gunshots. She heard Livingston tell the Appellant to hurry up (R. 839). Then she heard a big boom like an explosion (R. 840). Appellant returned to the truck and stated that his face felt like it was on fire. His eyebrows and eyelashes were singed and burned (R. 908). This was corroborated by Sergeant Schlein's observation of the Appellant and the photograph (R. 1013). Appellant told Karen Jackson to think about it (R. 840), and stated that he did those things because nothing was going to come between them (R908).

Karen Jackson's testimony was corroborated by the testimony of Barbara Finney, which related Appellant's search for Karen Jackson prior to the murders, and her observance of Appellant's camper in the area of the victim's house (R. 592, 596-597). In addition Officer Pace testified that Appellant told him on the day of the murders that he was going to see his wife that day (R. 644).

Appellant also admitted on the stand that some of the statements, that is when he last saw his wife, and when he received the burns on his face, which he made to Sergeant Schlein were false (R. 1293-1294). Appellant also testified that both Shirley Jackson and Officer Pace's testimony was incorrect (R. 1300-1301,1304-1305).

Other evidence which linked the Appellant to the crimes

were that he had keys which fit the handcuffs found on the scene (R.493, 737), other handcuffs and cans of inflammable liquid were found in the Appellant's vehicle (R.719), and yellow rope which matched that found on Walter Washington's wrists (R.954), was found in Appellant's home (R.717).

7. Although Sergeant Schlein never directly testified that he did not use hypnosis on Karen Jackson, in that he was never asked at trial, the State proffered during the discussion over the admissibility of Martin Seigel's testimony, that Schlein would testify that he never hypnotized Karen Jackson. The Appellant agreed that that would be his testimony (R.1183). The State further proffered that Schlein would testify that he would not hypnotize anyone in connection with a case that his police agency was investigating (R.1183). Karen Jackson testified that she did not recall Sergeant Schlein using a soft or soothing voice when he questioned her. She recalled that he only told her to speak slowly (R.904). She denied that Sergeant Schlein had suggested any of her answers (R.874).

8. The trial court allowed the Appellant to question Karen Jackson about her sexual relationship with the victim, Larry Finney (R.884, 886). The Appellant had agreed that he would not question Mrs. Jackson about her sexual relationship with anyone else (R.884). However, Appellant then asked Karen Jackson about her sexual relationship with Roy, and with a guy named Roderick (R.912-913). It was at this point that the trial court sustained the State's objection to this line of cross-examination and instructed the jury to disregard the question (R.913). It should be noted that Karen Jackson could not state whether Appellant was

a jealous man (R.918). It appeared that the Appellant was going to offer witnesses who would testify as to occasions where Mrs. Jackson had sexual relationships with other men (R.915). The Appellant was allowed to testify in detail as to the numerous times he found Karen Jackson involved with other men (R.1223-1226, 1228, 1234, 1235, 1236, 1239-1240, 1247).

9. The State had stipulated that Larry Finney had one prior conviction (R 616). Mrs. Finney acknowledged that the police had asked her whether Finney was involved with dealing drugs (R.613-614).

10. When the photographs taken of the Appellant after his arrest were introduced at trial, Appellant failed to object (R. 522-523, 526-530, 1013).

11. Appellant, in a pre-trial motion challenged the composition of the grand jury panel which indicted him on the basis that Section 40.24, Florida Statutes (1979), which provided that grand jurors were to be paid $10.00 a day, was a form of institutional racism because it forced blacks who were making minimum wage to fail to register to vote or to asked to be excused from jury duty (R.15-21).

During the hearing on the motion, the State argued that Appellant's counsel had been given notice at the bond hearing that the State would be taking the case to the grand jury (R.21). After the petit jury was selected the prosecutor stated that he would have preferred to have a black jury because the victims were all black (R.460).

12. At the July 2, 1981, hearing on various pre-trial motions filed by Appellant's counsel, counsel waived the presence of

the Appellant (R. 25).

13. Appellant did not object to the trial court's order instructing Appellant not to consult with his counsel during the recess in his cross-examination (R.1280).

14. Appellant's motion to change venue did not comply in any way with the provisions of Rule 3.240(b) of the Florida Rules of Criminal Procedure (R. 1573-1578).

15. Sergeant Crawford, who was working closely with Sergeant Schlein on the case, was the affiant for the search warrants. Sergeant Schlein was the affiant for the arrest warrant. Both affiants were the same (R. 228). Sergeant Crawford was present for the interview with Barbara Finney (R.158), as well as the interview with the Appellant (R.165).

16. Appellant was initially questioned at his home by Sergeant Schlein (R.214), after he voluntarily let the officer into his house (R. 217). Appellant was not placed under arrest (R. 214) and when the questioning was terminated, the Appellant was left in his home (R. 215). Sergeant Schlein testified that Appellant was not the target of the investigation at that point (R. 216). He told Appellant that he was trying to locate his wife (R. 217-218). It was not until after speaking to the Appellant and seeing the burns on his face, that the investigation focused on Appellant (R.220). After talking to Karen Jackson, Appellant became the suspect (R. 220).

17. The trial court gave the standard jury instructions on reasonable doubt (R.1406), as well as the former standard jury instruction on circumstantial evidence (R.1408). The trial court also gave the standard instruction on felony murder (R.1417-1419),

the principle instruction (R.1413), and the instruction on assessing a witness' credibility (R.1407), and an instruction that if the jury had a reasonable doubt as to whether the Appellant was present at the time at the scene of the alleged crime, it was their duty to find him not guilty (R.1414).

18. Prior to trial, the trial court had appointed Dr. Arthur Stillman to conduct a confidential psychiatric evaluation on the Appellant (R.1649).

The pre-sentence investigation report, which Appellant had an opportunity to review (R.1542), stated that the Appellant stated that he never had any mental or emotional problems and had never been in any mental institutions (SR.18). The report further noted that Karen Jackson believed that the Appellant was insane (SR.19). The report concluded that the possibility existed that the Appellant was under significant mental anguish or emotional duress at the time of the incident (SR.24). The trial court in its sentencing order found that due to Appellant's past marital problems, the possibility existed that at the time of the instant offense, Appellant may have been under significant mental anguish, or emotional duress (R.1551, 1753).

19. The adult victims knew the Appellant and could identify him as their kidnapper (R.820-823).

20. Roberta Tighe, who notified the fire department when she saw the car burning, testified that she saw fire coming from the cab area of the car (R.516). James Walker, the supervisor of the Broward County Sheriff's office bomb and arson squad, testified that the fire caused a rapid thermal expansion which caused the glass to crash (R.554).

21. Dr. Tate, the associate medical examiner testified that both children were alive at the time the fire started (R. 1067-1068). The children were in positions consistent with them covering or trying to avoid the fire (R.1087). Furthermore, Dr. Tate testified that although the children probably died before the flames got to them, he could not say for certain that they did not suffer from the flame exposure while alive (R.1084).

The children also saw their parents being shot (R.839).

22. Dr. Tate testified that Edna Washington died of a single gunshot wound to the back of the head (R.1061), Larry Finney had two gunshot wounds, one to the head and the other to the chest (R.1051-1053). Walter Washington had three gunshot wounds, one on the left base of the neck, one in the upper chest, and one in the right thigh (R.1058). Walter Washington had his hands bound behind him (R.1056). Both Larry Finney and Walter Washington died of multiple gunshot wounds (R.1055-1060).

23. The presentence investigation reported that although Appellant had no prior convictions for crimes of violence, he had been placed on five years probation for grand larceny, with the adjudication withheld, and that he had been arrested for conspiracy to commit robbery and petty larceny (SR.22).

POINTS INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Points on Appeal as follows:

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE?

II

WHETHER THE COMMENTS AND TREATMENT OF THE TRIAL COURT TOWARDS APPELLANT'S COUNSEL WERE IMPROPER OR PREJUDICIAL WHERE THEY WERE MADE WITHIN THE TRIAL COURT'S RESPONSIBLITY FOR THE TONE AND TEMPO OF THE PROCEEDING, TO ASCERTAIN THE TRUTH, AND TO CURTAIL PURSUIT OF IRRELEVANT MATTERS?

III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING THE APPELLANT'S CHALLENGES FOR CAUSE OF PROSPECTIVE JURORS AND PREVENTED APPELLANT FROM EXERCISING HIS PEREMPTORY CHALLENGES?

IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE A PHOTOGRAPH OF THE DECEASED' BODIES?

V

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS SUFFICIENT TO FIND THE APPELLANT GUILTY OF FIRST DEGREE MURDER?

VI

WHETHER THE TRIAL COURT COMMITTED ERROR, REVERSIBLE OR OTHERWISE IN VARIOUS EVIDENTIARY RULINGS?

POINTS INVOLVED ON APPEAL

(CONTINUED)

VII

WHETHER THE TRIAL COURT PROPERLY ADJUDICATED APPELLANT OF THE FIRST DEGREE MURDERS AND THE FELONIES OF KIDNAPPING WHERE THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATED MURDER?

VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF THE SENTENCING?

IX

WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH?

ARGUMENT

POINT I (Restated)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

It is well established that the granting or denial of a motion for continuance is within a trial court's discretion and will not be overturned absent a palpable abuse of discretion. Lusk v. State, 446 So.2d 1038, 1040 (Fla. 1984). This abuse of discretion must clearly and affirmatively appear in the record. Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980). Appellee submits that Appellant has clearly failed to show an abuse of discretion in the instant case.

On August 11, 1981, Appellant had previously filed a motion for continuance. The trial court granted it, despite the court expressing concern that the request for continuance had come six days before trial (R.63-64). Then on October 14, 1981, only five days before trial, Appellant filed a second motion for continuance (R.1656).

In the second motion for continuance, the main thrust[3/] was that due to a head injury which occurred during the second week of August, and the medication which he was required to take, he was unable to adequately defend the Appellant. Counsel alleged that the medication caused drowsiness and slurred speech (R.1656,

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3/ Counsel also alleged that he had not been able to depose witnesses in Tallahassee or have their depositions transcribed (R.133). Appellant and the State were able to work out a stipulation as to the witnesses (R.136). Furthermore, Appellant failed to show how he was prejudiced by not having the depositions transcribed. See State v. Prieto, 439 So.2d 288 (Fla. 3rd DCA 1983).

133). Counsel did not present an affidavit from his treating physician.[4/]

In Garner v. State, 28 Fla. 113, 9 So. 835 (1891), the defendant filed a motion for continuance on the grounds that counsel was too sick to conduct the defense properly. In support of the motion counsel presented a certificate from his physicians that stated that counsel was not in a prime condititon of health and in their opinion entirely incapacitated. The trial court noted that it had been observed that counsel had conducted an able defense in a capital case the day before, and that counsel had made various pre-trial motions. The trial court denied the motion for continuance. This Court affirmed, finding no abuse of discretion in refusing the motion for continuance. 9 So. at 839. See also United States v. Goodman, 457 F.2d 68, 71 (9th Cir. 1972), cert. denied, 406 U.S. 961 (1972).

Appellee submits that Garner is applicable to the instant case. Like the defendant's counsel in Garner, Mr. Cerf, despite his admonitions of slurred speech and drowsiness was able to argue numerous pre-trial motions without apparent problems (R.117-132, 154-247). He was also able to conduct jury voir dire with little problems (R.248-461). The trial court stated that after listening to counsel's ability to elucidate, it felt that it was contrary to what was stated in the motion to continue (R.133). Mr. Cerf stated that he did not have any problems with thinking

4/ The affidavit filed by Dr. Haynes in behalf of Mr. Cerf, was not filed until December 1, 1982, more than a year after trial. Furthermore, the affidavit stated that on January 21, 1982, the doctor certified that Mr. Cerf should not be involved in any trials for about ninety (90) days (R.1765). Again this was after trial.

or talking (R.133). When the trial court inquired before each proceeding, whether counsel was ready to proceed, Mr. Cerf stated that he was (R.469, 577, 779, 803, 969, 1332, 1457). The trial court told counsel that if he had a problem with his illness and needed to be excused, there would be no problem (R.632, 772). Furthermore during the trial, counsel participated vigorously, making numerous objections and motions for mistrial, and engaging in lengthy cross-examination. Appellee submits that Appellant has failed to show that counsel's illness affected the quality of counsel's mental activity when reviewing the trial in its entirety. See Mende v. United States, 282 F.2d 881, 884 (9th Cir. 1960). See also United States v. Prujansky, 415 F.2d 1045, 1049 (6th Cir. 1969).

Appellee submits that counsel's statements during various parts of trial that this drowsiness caused by the medication was causing him to be inattentive were if not self-serving, they were not prejudicial to Appellant, as they had no effect on the manner in which the trial and Appellant's defense was conducted. When counsel stated during a pre-trial hearing on numerous motions that he was not sure if the court had clearly ruled on one motion (R. 142), the court clarified its ruling (R.143). Despite counsel's statement to the jury that if his speech was a little slow or distorted it was because of the medication, counsel was able to conduct a lengthy voir dire (R.248-461). Furthermore, despite counsel's initial confusion as to his being allowed to further voir dire the prospective jurors (R.445), he was able to correct that misimpression and was allowed to use his remaining peremptory challenge to backstrike a juror whom he had already accepted (R.445).

When counsel forgot to question Barbara Finney about a certain matter, the trial court allowed her to be recalled as a witness (R.631-632). The court inquired about counsel's illness and told counsel that if he needed to be excused, there would be no problem (R.632). The Appellee submits that counsel was not serious about his motion to withdraw, despite counsel's statement to the contrary. In the instant case, counsel's actions speak louder than words. When counsel moved to withdraw prior to Shirley Jackson's testimony, it was obvious that his reason was due to the fact that the court initially refused to continue the case to allow counsel to get a court reporter to take Mrs. Jackson's deposition (R.772). When a court reporter became available, the trial court noted "let the record reflect that at 5:30 Mr. Cerf came back and he felt appreciably better since he had a court reporter here and he is out taking the witness' deposition right now and the court is waiting for him." (R.777). When counsel returned, the court inquired if his health had improved. Counsel said that he felt better, that he was at the court's mercy and was shook up (R.778). The court stated that no one was at his mercy, and apologized for having everyone stay late, but the court felt it had to defer to Mrs. Jackson because of her pregnancy problem. The court then asked counsel if he was ready to proceed, to which counsel replied yes (R.779). The court again apologized to counsel in front of the jury (R.288). Thus, despite counsel's statements, Appellant has failed to demonstrate that counsel could not adequately and did not adequately represent the Appellant.

Appellee would submit that Appellant's allegations of

ineffective assistance of counsel should not be considered by this Court on direct appeal. See Williams v. State, 438 So.2d 781, 786 (Fla. 1983). Although, many of Appellant's allegations concerning counsel's mistakes of law and judgment, may appear in the record, counsel's explanations for them, which if error, and may be explained as valid tactical choices, do not. However, if this Court should consider counsel's effectiveness, then Appellee submits that Appellant has failed to demonstrate that any omissions or acts by counsel prejudiced him. Despite Appellant's claims of ineffectiveness, counsel reserved his opening statement and requested the court to give the jury an instruction to that effect (R.469). Counsel later gave an opening statement (R.1101-1105) Counsel's insistence of a "package deal" on the stipulation of the victim's identities and cause of death had no effect on the trial. The State was unwilling to stipulate to the cause of death (R.144,507) and as a result a photograph which included Larry Finney was later to be introduced to show the cause of death (R.1070). Contrary to Appellant's assertions, the introduction of a .44 caliber handgun found at the Appellant's home was helpful to Appellant's defense, by indicating to the jury that the murder weapon, could not have been Appellant's .44 caliber revolver, as the bullets found in the victims were of a .38 caliber (R.933, 934, 941). Counsel further demonstrated that Appellant had the .44 caliber revolver for protection in his job (R.1131, 1276). The record shows an organized idea of a defense. Counsel tried to show that someone other than Appellant was responsible for these murders. As such he focused on one of the victims Larry Finney. He tried to show through cross-examination that Larry Finney had a prior criminal record

(R.616), and had access to drugs (R.613, 862), which involved a Cuban friend, Jose, who also worked at the hospital (R.614).

Appellee would further submit that counsel's failure to object to the introduction of and testimony about various items of physical evidence seized during a search of the Appellant's home and vehicle, as well as his statement to Detective Schlein was not evidence of counsel's ineffectiveness. For the reason stated in Appellant's brief, infra at pages 44-46, the motions to suppress were without merit. Furthermore, there is no indication whatsoever, that counsel's alleged physical or mental problems was the reason for his failure to make the necessary contemporaneous objection.

In any claim of ineffective assistance of counsel, Appellant must make a showing of prejudice. That showing requires Appellant to demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 35 Cr L 3066, 3073 (1984). See also Jackson v. State, ___ So.2d ___, Case No. 62,429, Fla., opinion filed June 12, 1984 [9 FLW 223]. Appellant has clearly failed to meet his burden.[5/] The trial court did not abuse its discretion in denying Appellant's motion for continuance.

5/ It should be noted that after trial, the trial court complimented counsel on the professional manner in which he represented Appellant (R.1518), and noted that counsel was a very effective and capable counsel (R.1567).

POINT II

THE COMMENTS AND TREATMENT OF THE TRIAL COURT TOWARDS APPELLANT'S COUNSEL WERE NOT IMPROPER OR PREJUDICIAL, WHERE THEY WERE MADE WITHIN THE TRIAL COURT'S RESPONSIBILITY FOR THE TONE AND TEMPO OF THE PROCEEDINGS, TO ASCERTAIN THE TRUTH, AND TO CURTAIL PURSUIT OF IRRELEVANT MATTERS (Restated).

Appellant alleges that various comments made by the trial court, in the presence of the jury, showed dissatisfaction with Appellant's trial counsel and defense and his preference for the prosecution, to the extent that he was deprived of a fair trial. Appellee submits that a review of the record in its entirety shows that the Appellant's allegations are simply not founded. See Brown v. State, 367 So.2d 616, 620 n.3 (Fla. 1979); Hayes v. State, 368 So.2d 374, 377 (Fla. 4th DCA 1979); Lister v. State, 226 So.2d 238, 239 (Fla. 4th DCA 1969).

Initially, Appellee would submit that Appellant has failed to preserve this issue for review. Appellant did not object to any of the comments by the trial court which he now raises on appeal as reason for reversal. There has been no showing whatsoever that an objection by counsel would have been futile. Nothing in the record is revealed that should have disuaded counsel from making a contemporaneous objection. As such, this issue may not be raised by Appellant for the first time on appeal. See Herzog v. State, 439 So.2d 1372, 1376 (Fla. 1983).

Appellee submits that these comments were not such as to constitute fundamental error, in that neither rebute nor retraction could eradicate its evil influence. Herzog v. State, supra. It is well recognized that the conduct of counsel during the progress of the trial is under the supervision and control

of the trial court in the exercise of its discretion. Murray v. State, 154 Fla. 683, 8 So. 2d 782, 784 (1944). See also Paramore v. State, 229 So.2d 855, 860 (Fla. 1969). As such, the trial judge is not a mere moderator or observer, but is responsible for the tone and tempo of the proceeding and may comment on the evidence and exercise his discretion to curtail pursuit of irrelevant matters. United States v. Butera, 677 F.2d 1376, 1382 (11th Cir. 1982). Furthermore the protection of witnesses under examination is included in the court's duty to maintain dignity of law in the courtroom. Baisden v. State, 203 So.2d 194, 196 (Fla. 4th DCA 1967). Thus, in determining whether the remarks of a trial judge are prejudicial, the burden is on the defendant to show prejudice, the trial court is presumed to be in the best position to decide when a breach has been committed and what corrective measures are required, the remarks are to be considered in light of the circumstances, with the ultimate consideration being the probable effect of the language upon the jury. Baisden v. State, supra at 197.

Appellant in his brief makes the following complaints about the trial court's conduct. Appellant alleges that the trial court's asking of the defense counsel to ask questions and finish up voir dire (R.385), as well as stating to counsel that he was holding up twelve or fourteen people (R.394) had a chilling impact on the Appellant. A review of the record shows that as to the first comment, the trial court was exercising his discretion in curtailing irrelevant matters, when defense counsel belabored a voir dire question about whether the jurors knew his brother, a Broward County realtor (R.385). The second comment was made outside the presence of the jury, while counsel was discussing

challenges to the jury venire (R.392). Furthermore, from the cold record, it is not possible to tell if in fact, the court was incorrect in stating that counsel was holding up the process.

Appellant complains that the trial court's comment that the photographs which Appellant was objecting to were not gruesome, belittled counsel's position (R.582). However, a review of the comment in context shows that it was nothing more than the court's ruling on defense counsel's objection. An adverse ruling does not mean that the trial court is adverse to or prejudiced against the Appellant. Appellant further complains of various comments by the court during cross-examination of Mrs. Finney, where the trial court stated that Mrs. Finney was answering the question as best she could (R. 610), and where the court told Appellant's counsel not to argue with the witness, that the jury could assess what they heard (R.614). Comments by a trial court that the witness is trying the best she can to answer a question is not a comment that the jury would have interpreted as going to the weight and credibility of the witness. See Blake v. State, 336 So.2d 454, 455 (Fla. 3d DCA 1976). Furthermore, the trial court's admonition not to argue with the witness was a proper exercise of the trial court's duty to protect witnesses. Appellant's assertion that these comments had the chilling effect of preventing counsel from zealously questioning the witnesses or presenting his defense is just not borne out by the record.[6/] Appellant

6/ In fact counsel continued to question Mrs. Finney about her son's prior criminal record and his possible involvement with Jose and drugs (R.615-616).

also complains of the trial court's questioning of witnesses which resulted in the admission of the evidence (R.703, 704, 710, 716, 717, 981). A review of these questions show that they are nothing but general questions, normally asked as a predicate for admission of the photographs and other evidence. At most it was an attempt by the court to clarify any uncertainties surrounding the admission of the evidence. The same is true for Appellant's assertions concerning comments made by the trial court during Karen Jackson's testimony (R.898, 905, 906). This Court has held that it is proper for a court to ask questions of witnesses to ascertain the truth or to clear up uncertainties. See Watson v. State, 190 So. 2d 161, 163-165 (Fla. 1966). See also Flowers v. State, 222 So.2d 786, 787-788 (Fla. 2d DCA 1969). That is all the trial court was doing in the instant case.

Appellant's complaints concerning the trial court's comments during counsel's cross-examination of Sergeant Schlein, as to the tape recording were proper questions by the court to clarify any uncertainty about the feasibility of the tape having been tampered with, and to curtail pursuit of irrelevant matters. Furthermore, Appellant's counsel belabored the point beyond necessity. It is proper for a trial court to stop counsel when they repeatedly cover the same ground. See Turner v. State, 297 So.2d 640, 642 (Fla. 1st DCA 1974). Appellee further submits that Appellant's allegation that the trial court showed favor to the prosecution by referring to a State witness by his first name (R.992), and by praising the prosecutor (R.749), is without merit.[7/]

7/ It should be noted that the prosecutor at one time remarked that he believed the judge had it in for him (R.624).

The trial court prior to trial instructed the jury that if he called someone by their first name, that they are not to interpret this as meaning that the court is leaning one way or the other (R 426). At the end of the trial, the court instructed the jury to disregard anything that he may have said or done that made them feel that the court preferred one verdict over another, and reminded the jury that the lawyers were not on trial and that their feelings about them should not influence their decision (R 1428-1429). Juries are presumed to have followed the trial court's instructions.

Appellant has failed to demonstrate otherwise, or that these comments, when not taken out of context, which Appellant has done, but in relation to the six days of trial, the court's actions and comments did not deprive Appellant of a fair trial.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING THE APPELLANT'S CHALLENGES FOR CAUSE OF PROSPECTIVE JURORS, NOR DID THE TRIAL COURT PREVENT APPELLANT FROM EXERCISING HIS PEREMPTORY CHALLENGES (Restated).

Appellant alleges that during jury selection, the trial court erred in denying his challenge for cause as to four prospective jurors, thus causing him to improperly exhaust his peremptory challenges. Appellant further alleges that the trial court prevented Appellant from selecting a fair and impartial jury by not allowing Appellant to back-strike jurors before the panel was sworn. Appellee submits that Appellant's position is without merit. See, Section 913.03(10), Florida Statutes (1979).

The question of the competency of a challenged juror is one of mixed law and fact that is within the trial court's discretion. This discretion should not be disturbed unless there is a manifest error. Singer v. State, 109 So. 2d 7, 22 (Fla. 1959). This Court should give greater deference to the trial judge's determination, as he was in the best position to evaluate the prospective juror's demeanor and answers to the questions. McCorquodale v. Balkcom, 721 F. 2d 1493, 1498 (11th Cir. 1983) (en banc); Hawthorne v. State, 399 So. 2d 1088, 1089 (Fla. 1st DCA 1981).

The test to be applied in determining whether the juror is subject to challenge for cause is:

> [Not] whether the juror will yield his opinion, bias or prejudice to the evidence, but should be that whether he is free of such opinion, prejudice or bias, or whether he is infected by opinion, bias, or prejudice, he will, nevertheless, be able to put such completely out of his

> mind and base his verdict only upon evidence given at trial. Singer v. State, 109 So. 2d 7, 24 (Fla. 1959).

See also Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984).

It is within this framework that Appellant's claim that the four prospective jurors, Kalos, Houck, Evans, and Kauffman, should have been excused for cause, must be considered.

Appellant alleges that Juror Kalos should have been excused for cause because she had read about the case in the papers and had discussed it with friends (R. 307). Mrs. Kalos stated that her opinion was strong at that time, but that she did not know if she was now prejudiced (R. 307). Similarly, Juror Houck stated that he had read about the case in the newspapers, watched it on television, as well as discussing it with a police officer friend of his (R. 261, 313-314). However, Mr. Houck stated that his mind might be swayed when he heard the other evidence, and then stated that his biggest problem was his concern over his work (R. 314). Juror Evans simply stated that he read about the case in the newspaper (R. 388), but specifically stated that he had not formed any opinions and would wait until after he heard all the evidence and the court's instruction on the law before forming an opinion (R. 388). Juror Kauffman stated that she had read about the case in the paper and was concerned about the children (R. 361). She stated that although she had a doubt as to her opinion, she understood that whatever appeared in the newspaper has no bearing in the court, that she could be impartial in this case and wait until she has heard all the evidence before reaching a verdict (R. 355).

During voir dire, the trial court and counsel continually asked all the jurors, including these four, if they had a state of

mind which would prevent them from acting with impartiality (R. 262, 352, 428), and whether they could render a verdict based on the evidence presented in the courtroom and the law as instructed by the court (R. 266, 269, 318-319, 390). The court and counsel received negative responses to the first question (R. 262, 266, 352, 428), and positive responses to the second (R. 266, 269, 319, 390). Thus, all members of the venire consistently told the court and counsel that they could set aside any bias and prejudice and render their verdict solely upon the evidence presented and the instructions on the law given by the court.

Appellant has failed to show that the jurors had an opinion which would raise the presumption of partiality. Murphy v. Florida, 421 U.S. 794, 800 (1975). The juror's responses, as fairly interpreted by the trial court, supported the trial court's holding that he was convinced that these four jurors could give the Appellant a fair trial. The trial court did not abuse its discretion and commit manifest error in refusing to allow the Appellant's challenges for cause.

Appellee further submits that Appellant's assertion that the trial court prevented him from back-striking is totally without merit. Initially it must be pointed out that Appellant never objected to the court's order of no back-striking, or even raise the issue that he was improperly prevented from exercising a back-strike against a prospective juror. Appellant has not shown that the trial court's actions prevented him from doing so, it would have

been futile. Thus, he has failed to preserve this issue for appeal. Denham v. State, 421 So. 2d 1082 (Fla. 4th DCA 1982).

However, more importantly when Appellant wanted to backstrike a juror, Mrs. Seery, whom he had already accepted, the trial court permitted him to do so (R. 442, 445). After questioning more jurors, the Appellant accepted the jury (R. 460). Appellant never asserted that there were any jurors that he wanted to backstrike. The jury was then sworn in (R. 461). The court did not deprive the Appellant of his right to exercise challenges to the jurors by swearing the panel, after the Appellant had an opportunity to object and did not ask for any additional peremptories in which to exercise.[8] See King v. State, 125 Fla. 316 169 So. 747, 748 (1936). Appellee further submits that the evidence against Appellant was overwhelming, see Appellee's Brief, infra at pp. 33-36, and thus any error was harmless. Jones v. State, 332 So. 2d 615, 619 (Fla. 1976).

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8 The trial court told Appellant that once his ten peremptories were used, he would consider more for good cause (R. 399).

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE A PHOTOGRAPH OF THE DECEASED BODIES (Restated).

It is well established that the admission into evidence of photographs of a deceased victim is within the sound discretion of the trial court. Wilson v. State, 436 So. 2d 908, 910 (Fla. 1983); Swan v. State, 322 So. 2d 485, 487 (Fla. 1975). "Relevancy" not "necessity" is the test for admissibility of gruesome photographs. Welty v. State, 402 So. 2d 1159, 1163 (Fla. 1981). Straight v. State, 397 So. 2d 903, 907 (Fla. 1981).

Appellee submits that the picture[9] was admissible where it was relevant not only to prove identity of each decedent (R. 1074), but also to show the deteriorated condition of the bodies which would have corroborated the medical examiner, Dr. Tate's testimony as to the condition of the bodies (R. 1073). In particular, the photograph depicted the "pugilistic" position, in which the victim, Edna Washington was found (R. 1074). Dr. Tate had testified that Edna Washington's body was found in a "pugilistic" attitude, which was described as being like a boxer, with the fists up, and which was caused by the body being subjected to extreme heat (R. 1060). Thus, the picture was relevant to show the circumstances surrounding the victims' deaths. See, e.g.,

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9 The trial court found that the photograph was not all that grizzly, and stated that the court had seen a lot more gruesome pictures than that (R. 1073). Furthermore, the fact that the picture was taken at the morgue does not preclude its admissibility. Wilson v. State, supra.

Brumbley v. State, ___ So. 2d ___, Case No. 56,006, Fla., opinion filed June 14, 1984 [9 FLW 239, 240]; Wilson v. State, supra, 436 So. 2d at 910; as well as the premeditated and coldblooded intent of the Appellant. Booker v. State, 397 So. 2d 910, 914 (Fla. 1981).

The Appellee would also note that the admissibility of the photograph is not affected by any stipulation as to identity or cause of death, Foster v. State, 369 So. 2d 928, 930 (Fla. 1979), nor does it depend upon whether the objects could be described by testimony. Rather the relevant inquiry is whether it would be useful in enabling the witness to better describe and the jury to better understand. Dillen v. State, 202 So. 2d 904, 905 (Fla. 2d DCA 1967). Thus, where the one photograph, was not a close-up view (R. 1072), and not particularly grizzly (R. 1073), and relevant to establishing identity and the circumstances and manner of death, the photograph was admissible.

Appellee would also submit that the testimony concerning the pregnancy of Edna Washinton was admissible to establish identity. Edna Washington's pregnancy was a fact in the case. A defendant must take his victims as he finds them. See, e.g., Welty v. State, 402 So. 2d 1159 (Fla. 1981) (circumstances surrounding victim's loss of leg relevant to show identity); Ruffin v. State, 397 So. 2d 277 (Fla. 1981) (victim was seven months pregnant); Jackson v. State, 366 So. 2d 752 (Fla. 1978) (victim was eight months pregnant). However, if Edna Washington's pregnancy was not admissible, Appellee submits it was not so prejudicial so as to require a new trial where the trial court did instruct the jury on two occassions that the Appellant was not on trial for anything concerning the fetus (R. 520, 1067).

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS SUFFICIENT TO FIND THE APPELLANT GUILTY OF FIRST DEGREE MURDER. (Restated)

The Appellant asserts that the evidence was insufficient to sustain a finding of guilt of first degree murder. Thus, the standard in determining on appeal whether the evidence was sufficient is whether after all conflicts in evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, there is substantial competent evidence to support the verdict and judgment. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). It is the jury which is the trier of fact, and the appellate court should not substitute its judgment for that of the trier of fact absent a clear showing that the findings are erroneous as a matter of law. Rose v. State, 425 So.2d 521 (Fla. 1983). Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

Appellee submits that the evidence was more than sufficient to support Appellant's conviction for first degree murder and kidnapping. Karen Jackson testified that the Appellant came to the home of Walter and Edna Washington, with the co-defendant, Livingston on the night of the murders (R.822, 828). She told how Appellant forced his way into the bedroom where she was hiding (R.824-825). The photographs of the Washington home corroborated her testimony (R.704, 707). She testified that she was forced to pack her and her children's belongings, and that Livingston had a gun which he was holding on everyone (R.826, 828-829). She testified that she took her belongings and put them in the back of the Appellant's truck (R.831). Karen Jackson states that Appellant told her not to try anything, and she saw Walter Washington

and Larry Finney come out of the house with their hands behind their back (R.832). She and her children were placed in the cab of the camper, the Washingtons and their two children, Finney, and Livingston were in the back. She stated that Edna Washington was the last person to get in the back of the camper. The Appellant remained outside until everyone was in (R.835). This was corroborated by the testimony of Shirley Jackson who saw the Appellant and Karen Jackson putting things in the camper (R.785), as well as seeing Edna Washington getting into the back of the camper (R.786), the Appellant locking the camper and then driving off (R788).

Karen Jackson then testified that the Appellant drove the camper into Broward County. The Appellant passed the abandoned car four times. Then he stopped (R.837). Appellant got out of the camper and standing behind the camper, talked to Livingston. The Appellant opened the back of the camper and ordered the victims to get into the abandoned car (R.838-839). She heard gunshots. Livingston then got into the back of the camper and Karen Jackson heard Livingston tell the Appellant to hurry up (R.839). Then she heard a big boom like an explosion (R.840). Appellant returned to the truck and stated that his face felt like it was on fire. His eyebrows and eyelashes were singed and burned (R.908). This was corroborated by Sergeant Schlein's observation of the Appellant and the photograph (R.1013). Appellant told Karen Jackson to think about it (R.840), and stated that he did those things because nothing was going to come between them (R.908).

Karen Jackson's testimony was corroborated by the testimony of Barbara Finney, which related Appellant's search for Karen Jackson prior to the murders, and her observance of Appellant's

camper in the area of the victim's house (R. 592, 596-597). In addition Officer Pace testified that Appellant told him on the day of the murders that he was going to see his wife that day (R. 644).[10/] Appellant's involvement and intent to commit these crimes can further be demonstrated by the statements which he told to Sergeant Schlein, which Appellant admitted at trial were false (R 1293-1294). Furthermore, the conflicts in Appellant's testimony with that of other witnesses (R. 1300-1301, 1304-1305) which the jury believed can be considered as substantive evidence, and thus probative of whether the defendant has presented any reasonable hypothesis of innocence. Williams v. State, 437 So.2d 133, 135 (Fla. 1983).

Appellee submits that the above evidence more than sufficiently supports Appellant's conviction for first degree murder, not only on a felony-murder theory, but as a principle to premidated murder. The evidence overwhelmingly establishes premeditation on the part of the Appellant. The evidence established that the premeditation did not occur just a moment before the act, but showed that Appellant had ample opportunity to consider his actions during a long drive from Dade County to Broward County. See, e.g., Card v. State, ___ So.2d ___, Case No. 61,715, Fla., opinion filed June 7, 1984 [9 FLW 217, 219]. In addition, the act of setting the car ablaze, which killed the two children, was clearly an act of premeditation. Even if Appellant did not

10 / There was other physical evidence to implicate the Appellant, including the handcuffs found on the scene, which Appellant's keys fit (R. 453, 737); other handcuffs and cans of inflammable liquid found in the Appellant's car (R. 719), as well as the yellow rope found in the Appellant's home (R. 717), which matched that found on Walter Washington's wrists (R. 954).

shoot the adults, there is little question that Appellant not only knew, but contemplated that the lives would be taken. As such, he is guilty of first degree murder as an aider and abettor. See James v. State, ___ So.2d ___, Case No. 62,551, Fla., opinion filed May 24, 1984 [9 FLW 199]. Thus, there is substantial evidence to support Appellant's convictions.[11]/

11/ Appellee submits that under the facts of this case, the "interest of justice" does not require that this Court reverse for a new trial. Karen Jackson's testimony, unlike the witness in Tibbs v. State, supra, was not weak or dubious. As stated, supra, her testimony was corroborated in many areas by other witnesses and physical evidence. See, Clark v. State, 379 So. 2d 97 (Fla. 1979). The verdict was not contrary to the weight of the evidence.

POINT VI

THE TRIAL COURT DID NOT COMMIT ERROR, REVERSIBLE OR OTHERWISE, IN VARIOUS EVIDENTIARY RULINGS (Restated).

Appellant alleges that the trial court made various errors of fact and law, which taken cumulatively, prevented the Appellant from receiving a fair trial. Appellee submits that the trial court's various rulings on evidentiary and procedural matter were either not error or if error were harmless, not affecting Appellant's rights to a fair trial.

A. The Trial Court Did Not Abuse Its Discretion In Not Allowing The Appellant To Present Expert Testimony On The Subject Of Hypnosis.

Trial court's enjoy a certain amount of discretion in the ruling on the admissibility of evidence. Chandler v. State, 366 So. 2d 64, 70 (Fla. 3d DCA 1978). A trial court does not abuse its discretion where the evidence is so remote or slightly probative, that it is nothing but pure speculation with no support in the record. See, e.g., Hitchcock v. State, 413 So. 2d 741, 744 (Fla. 1982); Bishop v. State, 438 So. 2d 86 (Fla. 4th DCA 1983).

Appellant has failed to demonstrate that Karen Jackson had been subjected to hypnosis by Sergeant Schlein. Schlein denied using hypnosis (R. 1183), and his denial was supported by Karen Jackson's testimony (R. 874, 904). The testimony of Martin Seigel had no legitimate tendency to prove or disprove a given proposition that was material to the case. See United States v.

Wertis, 505 F. 2d 683, 685 (5th Cir. 1979). Compare Bundy v. State, ___ So. 2d ___ , Case No. 57,772, Fla., opinion filed June 21, 1984 [9 FLW 257, 260-261]. The trial court did not abuse its discretion in finding that Martin Seigel's testimony was irrelevant.[12]

B. The Trial Court Did Not Abuse Its Discretion In Sustaining Objections To Lines Of Inquiry On Cross-Examinations.

Trial judges are vested with considerable discretion in regulating the manner of cross-examination of witnesses. Demps v. State, 395 So. 2d 501, 505 (Fla. 1981). The court's rulings will not be disturbed unless a clear abuse of discretion is shown. Maggard v. State, 399 So. 2d 973 (Fla. 1981).

Appellee submits that Appellant's cross-examination of Karen Jackson as to her sexual relationship with a security guard named Roy was totally irrelevant to the issue of whether the Appellant's jealousy induced the murders. Rather it was nothing but a blatent attempt to go into a collateral matter, with no other purpose but to embarrass Karen Jackson. The trial court had allowed Appellant to question Karen Jackson about her sexual relationship with the victim, Larry Finney, (R. 884, 886). It

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12 Any error would be harmless, where the testimony was only tangently relevant to assessing Karen Jackson's credibility, and where the evidence against Appellant was overwhelming.

was only after Appellant reniged on his agreement not to question her about her relationship with anyone else (R. 884, 912-913), that the trial court limited this area of cross-examination (R. 913). The purpose of the testimony was to embarrass the witness and to show general acts of misconduct on the part of the witness, and was thus properly excluded. See, e.g., Washington v. State, 432 So. 2d 44, 47 (Fla. 1983); Nelson v. State, 99 Fla. 1032, 128 So. 1, 3 (1930); Tully v. State, 69 Fla. 662, 68 So. 934 (1915); Bailey v. State, 411 So. 2d 1377 (Fla. 4th DCA 1982); Maycock v. State, 248 So. 2d 411 (Fla. 3d DCA 1972); Urga v. State, 155 So. 2d 719 (Fla. 2d DCA 1963); Carter v. State, 101 So. 2d 911 (Fla. 1st DCA 1958).[13]

Appellee also submits that there was no error in the trial court's sustaining the State's objections to Appellant's questions to Barbara Finney concerning Larry Finney's criminal past, and to Finney's ability to procur drugs from the hospital where he worked. Initially it should be noted that the State stipulated that Finney had one prior conviction (R. 616), and that Mrs. Finney acknowledged that the police had asked her whether Finney was involved with dealing drugs (R. 613-614). Appellee asserts that the questions asked to Mrs. Finney were identical to those disallowed in Proffitt v. State, 315 So. 2d 461, 464 (Fla. 1975). See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

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[13] Appellee would also submit that any error would be harmless where the Appellant was allowed to testify in detail as to the numerous times he found Karen Jackson involved with other men (R. 1223-1224, 1226, 1228, 1234, 1235, 1236, 1239-1240, 1247). See,e.g., Johnson v. State, 338 So. 2d 252 (Fla. 1st DCA 1976)

In addition, Appellee submits that the questions concerning Finney's criminal background were properly excluded as relevant only to show Finney's alleged bad acts, an impermissible purpose. See Hitchcock v. State, supra, 413 So. 2d at 744. Thus, the trial court did not abuse its discretion in sustaining these lines of inquiry on cross-examination.

C. The Photographs Of Appellant Taken After His Arrest Were Admissible.

Appellant alleges that on appeal, as he did in the trial court that the photographs taken of the Appellant after his arrest should be suppressed because they were taken by order of the arresting officers without the benefit of a motion or a court order (R. 175-176). However, Appellant has cited no rule, statute, or other authority for said proposition, and Appellee has been unable to find any. Not only is this issue not preserved for review by Appellant's failure to object at trial (R. 522-523, 526-530, 1013), Fraterrigo v. State, 151 Fla. 634, 10 So. 2d 361 (1942), but it is without merit where Appellant has no expectation of privacy in his face once he has been legally arrested and photographed pursuant to routine administrative procedures for booking of defendants. See, e.g., Illinois v. Lafayette, ___ U.S. ___, 103 S. Ct. 2605 (1983). In addition, any error would be harmless where Sergeant Schlein testified as to the marks which Appellant had on his face (R. 1013).

D. The Trial Court Did Not Err In Denying Appellant's Motion To Strike The Grand Jury Panel Or The Petit Jury Panel.

Appellant challenged the composition of the grand jury

panel which indicted him on the basis that Section 40.24, Florida Statutes (1979), which provided that grand jurors were to be paid $10.00 a day, was a form of institutional racism because it forced blacks who were making minimum wage to fail to register to vote or to ask to be excused from jury duty (R. 15-21). Appellee submits that Appellant's position is without merit.

Appellee would initially assert that Appellant waived his right to challenge the grand jury venire by his failure to challenge the grand jury before it was impaneled and sworn when he knew prior to his indictment that the case would be taken to the grand jury (R. 21). Section 905.05, Florida Statutes (1979). See Whitney v. State, 132 So. 2d 599 (Fla. 1961). Compare Francois v. State, 407 So. 2d 855 (Fla. 1981).

Appellee further submits that the Appellant's challenge to the grand jury was merely conclusionary, and failed to assert facts which would allege a prima facie case of underrepresentation and raise a doubt as to whether the panel was improperly constituted. See Duran v. Missouri, 439 U.S. 357, 364 (1979); Casteneda v. Partida, 430 U.S. 482, 494 (1977); Dykman v. State, 294 So. 2d 633 (Fla. 1973). Appellant failed to submit statistics or figures to indicate the percentage of blacks in the community [and who were making minimum wage] and those called for jury duty.

Appellee further submits that the trial court did not err in failing to strike the petit jury venire as not having a representative number of black members. Defendants are not entitled to a jury of any particular composition. Taylor v. Louisiana, 419

U.S. 538 (1975); Swain v. Alabama, 380 U.S. 202 (1965). Furthermore, Appellant had not even alleged that the lack of blacks on his petit jury was due to the prosecutor's use of peremptory challenges.[14] See Neil v. State, 433 So. 2d 151 (Fla. 1983). The trial court did not err in denying Appellant's motion to strike the jury venire.

E. The Trial Court Did Not Err In Conducting A Pre-Trial Hearing On Various Motions In The Absence Of The Appellant.

Initially, Appellee would submit that the only hearing in which the record indicates that Appellant was absent for was a hearing on July 2, 1981, (R. 24-26). Prior to the hearing, defense counsel was asked if he needed the Appellant to handle the motions. Counsel replied no (R. 25). After waiving Appellant's presence, the trial court proceeded with the motions (R. 25).

Appellee submits that this pre-trial hearing was not a critical stage of the proceeding which required Appellant's presence. Only legal arguments were presented. No evidence was taken. Appellee asserts that such a hearing is akin to motions to suppress photographs alleged to be inflammatory; Herzog v. State, 439 So. 2d 1372, 1375 (Fla. 1983); or bench conferences, Shriner v. State, ___ So. 2d ___, Case No. 65,452, Fla., opinion

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[14] In fact, the prosecutor stated that he would prefer to have a black jury because the victims were all black (R. 460).

filed June 15, 1984 [9 FLW 243]; or charge conferences. Randall v. State, 346 So. 2d 1233 (Fla. 3d DCA 1977). See also Blanco v. State, ___ So. 2d ___, Case Nos. 62,371 & 62,598, Fla., opinion filed June 7, 1984 [9 FLW 215]. In addition, at Appellant's subsequent appearances, he never objected. A defendant's subsequent acquiesence in matters conducted during his absence by his attorney will be construed as a waiver of the defendant's right to be present at proceedings before the court. State v. Melendez, 244 So. 2d 137 (Fla. 1971). Thus, no reversible error is present.

F. The Trial Court Did Not Reversibly Err In Ordering Appellant Not To Converse With His Attorney During A Recess In Appellant's Cross-Examination.

Appellee acknowledges that a trial court cannot deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, no matter how brief the recess is. Bova v. State, 410 So. 2d 1343 (Fla. 1982). However, Appellee submits that Appellant has waived any error by his failure to object to the trial court's order (R. 1280). Furthermore, Appellee asserts that Appellant has shown no actual prejudice from the trial court's order, or that the brief restraint on defense consultation in any way contributed to the jury's finding of guilt. Thus, the error was harmless. Bova v. State, supra, 410 So. 2d at 1345; McFadden v. State, 424 So. 2d 918 (Fla. 4th DCA 1982).

G. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Motion To Change Venue Due To Pre-Trial Publicity.

Initially, Appellee would submit that the trial court properly denied Appellant's motion to change venue where the motion did not comply in any way with the provisions of Rule 3.240(b) of the Florida Rules of Criminal Procedure (R. 1573-1578).[15] Allen v. State, 174 So. 2d 538 (Fla. 1965). In addition, Appellant has failed to demonstrate that it was impossible for him to receive a fair and impartial trial in Broward County because of pre-trial publicity. Of the thirty-two prospective jurors examined, four admitted to having read about the case or having heard about it on radio. As stated supra, all the prospective jurors were able to state, when questioned by the trial court that they could decide the issues based upon the evidence heard, the exhibits examined in the courtroom, and the instructions on the law given by the court. Thus, there is nothing in the record to indicate that the trial court abused its discretion in denying Appellant's motion for change of venue. See, e.g., Dobbert v. Florida, 432 U.S. 282 (1977); Tafero v. State, 403 So. 2d 355 (Fla. 1981); Straight v. State, 397 So. 2d 903 (Fla. 1981); Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

H. The Trial Court Did Not Err In Denying Appellant's Motions To Suppress Physical Evidence And Statements.

As Appellant concedes in his brief, counsel did not object at trial to the introduction of the various items of physical

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[15] Although Appellant requested an extension of time to file affidavits, none were ever filed (R. 1584).

evidence obtained from a search of the Appellant's camper and home pursuant to two search warrants. Furthermore, Appellant did not object on constitutional grounds to the introduction of Appellant's tape recorded statement to Sergeant Schlein. Therefore, Appellant has not preserved this issue for appeal.

Appellee submits that although the statement in the affidavit for the search warrants, that the affiant had taken a sworn statement from Karen Jackson, was not true, the record supports a finding that the misstatement was made innocently or negligently, and not intentionally or recklessly with an intent to deceive the issuing judge. See Francis v. State, 412 So. 2d 931, 932 (Fla. 1st DCA 1982). Sergeant Crawford, who was working closely with the case with Sergeant Schlein, was the affiant for the search warrants. Sergeant Schlein was the affiant for the arrest warrant. Both affiants were the same (R. 228). Sergeant Crawford was present for the interview with Barbara Finney (R. 158), as well as the interview with the Appellant (R. 165). Other information was learned from other officers and included in the affidavit. This is permissible. See, e.g., United States v. Steed, 465 F. 2d 1310, 1315 (9th Cir. 1972).

In addition the Appellee asserts that without that statement, there is sufficient probable cause to support the warrant based on the statements and observations by the witnesses and the Appellant himself.[16]

16/ 16 If the court did err in denying the motion to suppress, the Appellee asserts that due to the other evidence, including the testimony of Karen Jackson which was corroborated by other witnesses, see text, supra at 33-36, the error was harmless.

Appellant also alleges that the tape recording of his statement to Sergeant Schlein should have been suppressed because he was not given his Miranda warnings. Appellee submits that the trial court was correct in denying the motion to suppress where there was no custodial interrogation, where the Appellant was questioned in his home, not placed under arrest, left in his home after questioning, and not the target of the investigation (R. 214, 218, 220). See, e.g., Oregon v. Mathiason, 429 U.S. 492 (1977); State v. Whitfield, 444 So. 2d 1154 (Fla. 2d DCA 1984); State v. Wright, 404 So. 2d 155 (Fla. 3d DCA 1981); State v. Clark, 384 So. 2d 687 (Fla. 4th DCA 1980).

I. The Trial Court Did Not Err In Denying Appellant's Requested Jury Instructions.

Appellant alleges that the trial court erred in denying his request for a specific instruction on circumstantial evidence, on felony murder, and on hypnosis. Appellee submits that the jury instructions given by the trial judge as to circumstantial evidence, reasonable doubt (R. 1406, 1408), felony murder (R. 1417-1419), and other pertinent instructions (R. 1413, 1414), were proper statements on the law and adequately instructed the jury on Appellant's theory of defense. Thus, the trial court was not required to further instruct the jury as requested by the Appellant (R. 1317).

Appellee also submits that Appellant was not entitled to a special instruction on hypnosis where there was no evidence to support such an instruction. See e.g., Dreisch v. State, 436 So. 2d 1051 (Fla. 3d DCA 1983).

Appellant has failed to demonstrate error on the part of

the trial court in its various evidentiary and procedural rulings. Furthermore, if any ruling was in error, Appellant has failed to demonstrate that he has been prejudiced to the extent that he did not receive a fair trial.

POINT VII

THE TRIAL COURT PROPERLY ADJUDICATED APPELLANT OF THE FIRST DEGREE MURDER AND THE FELONIES OF KIDNAPPING WHERE THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATED MURDER (Restated).

Appellee would submit initially that the State was not required to elect between the themes of felony murder and premeditated murder. See Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983); Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981). Furthermore as stated supra, in Point V, there was more than sufficient evidence for the jury to have found premeditation so that the sole basis for the conviction was not felony murder. See,e.g., Blanco v. State, ___ So. 2d ___, Case Nos. 62,371 and 62,598, Fla., opinion filed June 7, 1984 [9 FLW 216]. Squires v. State, ___ So. 2d ___, Case No. 61,931, Fla., opinion filed March 15, 1984 [9 FLW 98, 99]; White v. State, 446 So. 2d 1031, 1037 (Fla. 1984); McCampbell v. State, 421 So. 2d 1072, 1074 (Fla. 1982); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982); Buford v. State, 403 So. 2d 943, 949 (Fla. 1981). Thus, the adjudications for the felonies were proper.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF THE SENTENCING. (Restated)

As with the trial itself, the granting or denial of a motion for continuance of a sentencing or penalty hearing is within the discretion of the trial court. Williams v. State, 438 So. 2d 781, 785 (Fla. 1983); Stewart v. State, 420 So.2d 862, 864 (Fla. 1982). Appellee submits that under the circumstances in the instant case, the trial court did not abuse its discretion.

Appellant alleges that the trial court erred in failing to continue the sentencing to allow a psychiatric evaluation to be included in the pre-sentence investigation. Appellee submits however, that if a psychiatric evaluation was not included in the pre-sentence investigation, it was due to Appellant's inactions and not the trial court's. The record is clear that counsel for Appellant requested such a psychiatric evaluation. Yet, despite the lack of objection by the State and the acquiesence of the trial court to the request, Appellant failed to file a written motion, but more importantly failed to prepare an order as requested by the trial court (R 1519). This is what distinguishes the instant case from that of Perri v. State, 441 So.2d 606 (Fla. 1983) cited by Appellant.[17]/

Appellee further submits that psychiatric testimony was available to Appellant to present to the trial court at the time of sentencing. Prior to trial, the trial court had appointed Dr.

17/ In addition Perri had told the judge, unlike the Appellant (SR 18), that he had been in mental institutions.

Arthur Stillman to conduct a confidential psychiatric evaluation on the Appellant (R 1649). If there were any opinions or statements in the report that would have been favorable to Appellant on the existence of the mental mitigating circumstances, Appellant could have provided Dr. Stillman's report to the court. Thus, there is nothing in this record to indicate that the trial court limited the Appellant's presentation of any mitigating factors. Rather, it appears that the defense, itself, limited its presentation. See Hitchcock v. State, 413 So.2d 741, 748 (Fla. 1982).

Under Rule 3.720(b) of the Florida Rules of Criminal Procedure, the trial court only has to give a defendant an opportunity to present matters in mitigation. That a defendant is "unprepared to do so is more of a function of a failure to think ahead" than an abuse by the trial court. Miller v. State, 435 So.2d 258, 261-262 (Fla. 3d DCA 1983). Appellee asserts that such is applicable to the instant case.

Appellee would also submit that any error in denying the motion for continuance would be harmless error were the Appellant received some mitigation because of his mental state. The trial court in its sentencing order found that due to Appellant's past marital problems, the possibility existed that at the time of the instant offense, Appellant may have been under significant mental anguish or emotional duress (R 1551, 1753).

POINT IX

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH (Restated).

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appears strong reasons to believe that reasonable persons could not agree with the recommendation. LeDuc v. State, 365 So. 2d 149 (Fla. 1978). The Appellant alleges various reasons why death is not a proper penalty in this case. Appellee will address each of Appellant's contentions separately and show that each is without merit.

A. The Murders Were Committed For The Purpose Of Avoiding Arrest.

In Riley v. State, 366 So. 2d 19, 22 (Fla. 1978), this Court held that the aggravating factor that a murder was committed for the purpose of avoiding arrest, is not limited to cases where a police officer is killed, but rather encompasses situations in which the defendant has committed the murder to eliminate a witness where proof of the requisite intent to avoid arrest and detection is very strong. Appellee submits that such proof is present in the instant case.

There is no question that the five victims were taken and kidnapped, while the Appellant forced his wife, Karen Jackson, to return home to him with his two children. There is little doubt that the victims, certainly the adults, knew the Appellant

and could identify him as their kidnapper (R. 820-823).

The fact that the Appellant never expressed his motive by a statement is not dispositive of the issue. Actions very often speak louder than words. See, e.g., Bolender v. State, 422 So. 2d 833 (Fla. 1982); Adams v. State, 412 So. 2d 850 (Fla. 1982); Washington v. State, 362 So. 2d 658 (Fla. 1978).

The fact that the Appellant admitted knowing the victims is proof of the requisite intent to avoid detection. Lightborne v. State, 438 So. 2d 380, 391 (Fla. 1983). See also Card v. State, ___ So. 2d ___, Case No. 61,715, Fla., opinion filed June 7, 1984 [9 FLW 217, 219]. Furthermore, the fact that Appellant did not kill Karen Jackson, the sole eyewitness does not detract from the finding of this aggravating circumstance. See Routly v. State, 440 So. 2d 1257, 1263 (Fla. 1983). Thus, the Appellee submits that this aggravating circumstance was proved beyond a reasonable doubt.[18]

B. The Murders Created A Risk Of Death To Many Persons.

Appellee submits that the trial court's finding that the Appellant has created a great risk of death to many persons was supported by the evidence that the Appellant, after the three adults were shot, set fire to the car which contained not only the adults but the two children. In addition, Karen Jackson testified that she heard a big boom like an explosion (R. 839-840). Roberta

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[18] Appellee suggests that the fact that the prosecutor was not sure that this aggravating circumstance applied (R. 1470), is not of significance. It is the trial court, not the prosecutor or the defense counsel, as the trier of fact, who determines whether the factor has been proved beyond a reasonable doubt.

Tighe, who notified the fire department, saw the car burning and noticed the fire coming from the cab area of the car (R. 516). James Walker, the supervisor of the Broward Sheriff's office bomb and arson squad, testified that the fire caused a rapid thermal expansion which caused the glass to crash (R. 554).

In King v. State, 390 So. 2d 315, 320 (Fla. 1980), this Court upheld the finding of this aggravating circumstance where the defendant after stabbing the victim set fire to the house. This Court rejected the contention that this factor did not apply because no person other than the victim was in the house at the time of the arson. The Court held that the defendant should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call. Id. See also Welty v. State, 402 So. 2d 1159, 1164 (Fla. 1981); DeLap v. State, 440 So. 2d 1242, 1256 (Fla. 1983). Appellee submits that Appellant should have reasonably foreseen that the igniting and burning of the automobile would pose a great risk to the firefighters and the police who responded to the call, as well as the residents in the area, if the fire would have spread. Thus, the trial court did not err in finding that the murders created a risk of death to many persons.

C. The Murders Were Heinous, Atrocious And Cruel.

The trial court found that the murders were heinous, atrocious, and cruel (R. 1752-1753). Appellee submits that this

finding is supported by the record.

Initially, it cannot be seriously questioned that the children's death, from smoke and soot inhalation caused by the fire was not heinous, atrocious and cruel. Dr. Tate, the associate medical examiner, testified that both children were alive at the time the fire started (R. 1067-1068). The children were in positions consistent with them covering or trying to avoid the fire (R. 1087). Furthermore, Dr. Tate testified that although the children probably died before the flames got to them, he could not say for certain that they did not suffer from the flame exposure while alive (R. 1084). See e.g., Bolender v. State, 422 So. 2d 833 (Fla. 1982); Jent v. State, 408 So. 2d 1024 (Fla. 1981); Smith v. State, 365 So. 2d 704 (Fla. 1978).

Appellee also submits that Appellant's argument that the murders of the three adults were not especially heinous, atrocious or cruel because they were accomplished instantaneous must be repudiated. This Court has, on a number of occasions, found this aggravating circumstance to be applicable when there has been fear and emotional strain proceeding the victim's almost instantaneous death. See, e.g., Preston v. State, 444 So. 2d 939, 945 (Fla. 1984); Routly v. State, 440 So. 2d 1257, 1265 (Fla. 1983); Adams v. State, 412 So. 2d 850, 857 (Fla. 1982); Francois v. State, 407 So. 2d 885, 890 (Fla. 1981).

Larry Finney died from two gunshot wounds, one to the head and the other to the chest (R. 1051-1053, 1055). Walter Washington died from three gunshot wounds, one on the left base of the neck, one in the upper chest, and one in the right thigh

(R. 1058, 1060). Walter Washington had his hands bound behind him (R. 1056). Edna Washington died from a single gunshot wound to the back of her head (R. 1061). However, her body had assumed a "pugilistic attitude," which is like a boxer, with fists up, and caused by exposure to extreme heat (R. 1060).

The evidence further showed that prior to their deaths, the victims had been forced from their home at gunpoint (R. 828, 832). Walter Washington's, and Larry Finney's hands were tied behind their backs (R. 832). The five victims were placed in the back of Appellant's camper with the co-defendant Livingston (R. 833) until Appellant drove them to an isolated road in Pembroke Pines where they were then placed in an abandoned car that was on the side of the road (R. 837-839). The three adults were then shot, the car doused with a flammable liquid, and then set on fire, killing the children. There can be little doubt that the three adults throughout their abduction were under fear and emotional strain, believing that death would be impending. Certainly after the first shot was fired, the remaining victims knew that their death would soon follow. There is no question that these murders were heinous, atrocious and cruel.[19]

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[19] The fact that the trial court also noted that Edna Washington was pregnant is of no consequence. Although Mrs. Washington's pregnancy did not contribute to her death, common sense stated that she must have been concerned about her unborn child during her ordeal. See, e.g., Ruffin v. State, 397 So. 2d 277, 282 (Fla. 1981); Jackson v. State, 366 So. 2d 752, 756 (Fla. 1978).

D. The Murders Were Committed In A Cold, Calculated And Premeditated Manner.

The trial court in its sentencing order found that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R. 1753-55). Appellee submits that the trial court's findings are amply supported by the record where they show either a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the Appellant, which rises to a level beyond that which is require for a first degree murder conviction. Card v. State, supra, 9 FLW at 219; Jent v. State, 408 So. 2d 1024 (Fla. 1981).

Despite Appellant's statement to Karen Jackson that he was simply going to hold the victims hostage and place them in the car on the side of the road (R. 839), his actions showed otherwise. See discussion of the sufficiency of the evidence, supra at pp. 33-36. Furthermore, it must again be noted that all the adults were shot execution style (R. 1051-1053, 1056, 1058, 1061). Appellee cannot conceive of a more cold, calculating, premeditated murder without any pretense of moral or legal justification. See, e.g., Card v. State, supra; Herring v. State, 446 So. 2d 1049 (Fla. 1984); Routly v. State, supra; Harich v. State, 437 So. 2d 1082 (Fla. 1983); Bolender v. State, supra; Jent v. State, supra.

Appellee submits the trial court's consideration of Appellant's lack of remorse was not improper. Initially, it must be pointed out that the trial court did not consider it as

a separate aggravating circumstance, see Menedez v. State, 368 So. 2d 1278 (Fla. 1979), but considered it in his determination that the murders were cold, calculated and premeditated. Unlike, the aggravating factor of heinous, atrocious or cruel, which focuses on the manner in which the act was committed, see Pope v. State, 441 So. 2d 1073, 1077 (Fla. 1983), the aggravating factor of cold and calculated, focuses on the perpertrator of the act. Thus in determining whether there is any pretense of moral or legal justification for the act, the defendant's mind-set is an issue. Further, Appellee submits that in the instant case the Appellant's lack of remorse is not found in the exercise of constitutional rights, but from his own statements to Karen Jackson (R. 840, 908). However, if the trial court improperly considered Appellant's lack of remorse, Appellee submits that it was harmless error as it was at most redundant to the finding that the murders were cold and calculated. This is not an extreme case in which this sort of error will require a remand for consideration of the sentence. See Pope v. State, supra, 444 So. 2d at 1078.

E. The Trial Court Did Not Fail To Consider Mitigating Circumstances.

Appellant alleges that the trial court erred in failing to consider the Appellant's lack of significant criminal history because the evidence at the penalty phase showed that the Appellant had never been convicted of a crime (R. 1466). Appellee submits however that there was evidence of a significant criminal history that was presented to the court at the sentencing hearing.

Although, a trial court is limited in considering only those offenses for which a defendant was previously convicted when reviewing a defendant's prior criminal record as an aggravating circumstance, Spaziano v. State, 393 So. 2d 1119 (Fla. 1981), there is no such limitation requiring convictions as to the mitigating circumstance of no significant history or prior criminal activity. See, e.g., Quince v. State, 414 So. 2d 185, 188 (Fla. 1982) (consideration of juvenile records). The trial court was correct in finding that this mitigating factor did not apply to Appellant. Appellant was on probation for grand theft. He had been previously arrested for conspiracy to commit robbery and petty larceny (R. 22).[20] Additionally, when the Appellant was sentenced to death, he had been previously convicted and adjudicated on six (6) counts of kidnapping (R. 1459, 1750). These convictions alone are sufficient to negate this mitigating factor. See Daughtery v. State, 419 So. 2d 1067 (Fla. 1982).

Appellee submits that the trial court properly found that Appellant had the ability to appreciate the criminality of his conduct, the trial court considered Appellant's background, received a complete report on his domestic problems (R. 1549) and even recognized that Appellant may well have been under the influence of an extreme mental or emotional disturbance at the time

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20 These facts were contained in the presentence investigation report which Appellant had an opportunity to review and rebut at the hearing. The trial court at sentencing is permitted to consider evidence not introduced during the penalty phase. Engle v. State, 438 So. 2d 803, 813 (Fla. 1983).

of the murders because of his marital problems (R. 1551, 1753). The record indicates that the trial court gave serious considerations to this issue. So long as the evidence is considered, the trial court's determination of lack of mitigation will stand absent palpable abuse of discretion. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). As stated, supra, Appellant had an opportunity to present further psychiatric testimony, but for whatever reason chose not to. There is no inconsistency with the trial court's findings or any error.

F. Appellant Intended Or Contemplated That Life Would Be Taken.

In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court held that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on the defendant, who aided and abetted a felony in the course of which a murder was committed by others but who did not himself kill, attempt to kill, intend to kill, or contemplate that life would be taken. The facts of the instant case makes Enmund totatally inapplicable.

In the instant case, the Appellant was present at the killings (R. 837-840). He drove the victims in his camper to the eventual death car. Even if Appellant did not do the actual shootings, there is no question that Appellant was the one who doused the car with the flammable liquid and set it afire, killing the two children (R. 839-840, 908). Appellee submits that Appellant not only knew, but contemplated that the five lives would be taken. The murders, unlike those in Enmund were far from spontaneous.

See Hall v. State, 420 So. 2d 872 (Fla. 1982); Ruffin v. State, 420 So. 2d 591 (Fla. 1982). See also James v. State, ___ So. 2d ___, Case No. 62,557, Fla., opinion filed May 24, 1984 [9 FLW 199]. Thus Enmund is not applicable to the instant case.

G. Any Errors By The Trial Court In Its Sentencing Order Would Be Harmless Error.

Appellee submits that if this Court should find that the trial court improperly found one of the aggravating circumstances or committed any other sentencing error, then this Court should still affirm the sentence of death. Appellee submits that the instant case is one in which this Court "can know" that the result of the weighing process would not have been different had the impermissible factors not been present. See, e.g., Bassett v. State, ___ So. 2d ___, Case No. 58,803, Fla., opinion filed March 8, 1984 [9 FLW 91-92]; Vaught v. State, 410 So. 2d 147, 150-151 (Fla. 1982); Brown v. State, 381 So. 2d 690, 696 (Fla. 1980).

The record shows that after considering the mitigating evidence which was presented, the trial court was extremely concerned that the Appellant had brutally killed five people, two of which were children (R. 1549, 1752-1753). Furthermore, the fact that the trial court found that the mitigating circumstance of extreme mental or emotional disturbance, may "possibly" exist (R. 1753), indicates that the court did not give this mitigating circumstance much weight in its determination of sentence. See Brown v. State, supra, 381 So. 2d at 696. When this mitigating

factor is weighed against the four well-founded aggravating circumstances, it is clear that the trial court's decision to impose the death penalty would have been affected by the elimination of any unauthorized aggravating circumstance.[21] There can be little question that a comparison of the facts in the instant case clearly shows that the death sentence is the appropriate sentence. Compare Bolender v. State, supra; Francois v. State, 407 So. 2d 85 (Fla. 1982); White v. State, 403 So. 2d 331 (Fla. 1981); Ruffin v. State, supra; Hall v. State, supra.

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[21] If this Court should find that a remand is necessary, Appellee submits that it is not required that a new sentencing jury be impanelled, only that the trial court reconsider its sentence.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of death should clearly be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished to MICHAEL GELETY, ESQUIRE, Attorney For Appellant, 1700 E. Las Olas Boulevard, Suite 300, Fort Lauderdale, Florida 33301 by U.S. Mail delivery this 20TH day of July, 1984.

OF COUNSEL