IN THE SUPREME COURT OF FLORIDA

JUAN F. RAMOS,)

Appellant,)

vs.)

STATE OF FLORIDA,)

Appellee.)

)

CASE NO. 63,444

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR BREVARD COUNTY

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave., 4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TOPICAL INDEX

TOPICAL INDEX (continued)

TOPICAL INDEX (continued)

AUTHORITIES CITED

AUTHORITIES CITED (continued)

AUTHORITIES CITED (continued)

AUTHORITIES CITED (continued)

AUTHORITIES CITED (continued)

AUTHORITIES CITED (continued)

OTHER AUTHORITIES

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT A SUFFICIENT PREDICATE HAD BEEN SHOWN, NOTWITHSTANDING THE APPELLANT'S MOTION TO SUPPRESS TO THE CONTRARY, TO ALLOW THE INTRODUCTION OF TESTIMONY WITH REGARD TO CERTAIN DOG-SCENT DISCRIMINATION LINE-UPS.

ARGUMENT

The Appellant claims that the trial court should have refused to admit certain testimony regarding dog-scent discrimination line-ups performed by a German Shepherd (Harass II) in this case because no proper predicate for the admission of such testimony had been shown. The Appellant's pre-trial motion to suppress asserting just this ground was heard, inter alia, before the trial court and denied (R 2457-2458, 1773-2039).[1] A review of the testimony and argument presented at that hearing as well as the discussion by the trial judge below reveals the total lack of merit in the Appellant's argument.

The Appellant concedes that this Court has recognized the admissibility of dog trailing evidence to prove identity of an accused in a criminal prosecution provided a proper preliminary foundation has been laid. Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); Davis v. State, 46 Fla. 137, 35 So. 76 (1903). However, the Appellant is apparently unsatisfied with the criteria established by this Court and at least one other state court for evaluating the admissibility of such testimony. In Davis v. State, supra, the Court stated that testimony as to the actions of scent-tracking dogs was admissible as long as preliminary proof of the character of that

---

[1] (R) refers to the record on appeal; (AB) refers to the Appellant's initial brief.

dog was presented to show that reliance might reasonably be based upon the accuracy of the trailing attempted to be proved. Accordingly, there should first be testimony from someone who has personal knowledge of that fact that the dog used has an acuteness of scent and power of discrimination which have been tested in the tracking of human beings; furthermore, the intelligence, training and purity of the breed are all proper matters for consideration in determining the admissibility of such evidence, as is the behavior of the dog in its tracking task. In Tomlinson v. State, supra, the Court determined that certain testimony relating to the conduct of a trailing dog was properly admitted as competent because the character and dependability of the dog used in the case was "thoroughly established by the testimony of witnesses who had used the dog as a man trailer for many months." 176 So. at 545.

In Edwards v. State, 390 So.2d 1239, 1240 (Fla. 1st DCA 1980), the Court applied a similar predicate standard for the admissibility of dog tracking/scent testimony:

> Appellant argued that the evidence concerning the trailing of Wrinkles (tracking dog) should not have been introduced because of Wrinkles' young age. We disagree. At trial a proper predicate was laid for the admissibility of this evidence. Wrinkles' former owner, as well as his present trainer, testified to the training methods used with Wrinkles and his prior record of tracking humans. Previously he had been used successfully on four or five different occasions to track escapees from jail. Wrinkles was a purebred registered bloodhound and he was put down on a trial which the officers had visually followed from the house to the point where he started. There was no hesitation on Wrinkles' part in following the trial to appellant's vehicle. See Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937). See generally, Annot. 18 A.L.R.3d 1221 (1968).

Appellant's challenge to the adequacy of the predicate for admissibility of the dog-scent testimony is limited to his claim that because video tape equipment was not available to preserve the line-up and because the dog - Harass II - was not submitted to independent testing by an authority which the Appellant deems adequate, the testimony should not be admitted. Yet, the testimony adduced at the suppression hearing clearly revealed the character and dependability of Harass II in both tracking and scent discrimination line-up situations. Both John Preston, the dog's trainer and handler, and Kenneth Stayer, an individual trained by Preston who had accompanied him and Harass II in the conducting of some thirty-five (35) to forty (40) scent discrimination line-ups, testified to the dog's extreme reliability in both tracking and scent discrimination line-up situations (R 1828-1832, 1885-1890). Preston specifically explained both the theory and training involved in man trailing and scent discrimination by dogs, as well as the specific training undergone by Harass II, and he noted that he had participated in over a thousand (1,000) scent discrimination line-ups with Harass II (R 1817-1831). Preston had testified as an expert in the field of training and performing man trailing and scent discrimination tests with dogs in both state and federal courts, and the efforts of Harass II in scent discrimination line-ups had also been testified to by Preston in such courts of law (R 1820-1822, 1831).

Preston described Harass II as a purebred German Shepherd and explained that the dog held what was akin to a master's degree in tracking (R 1828-1832). He further noted that he had confirmed Harass II's abilities in numerous cases, and the dog's determinations have been corroborated in the cases he has worked to such an extent that in his expert opinion the dog has proven very reliable (R 1830-1832).

Preston's evaluation of Harass II's talents was bolstered by the testimony of Stayer who noted that he himself had conducted numerous tracking and scent discrimination line-up exercises and that he had also testified as an expert in those fields (R 1885-1888). Stayer also vouched for the "highly reliable" work that Harass II had done in the more than thirty-five (35) to forty (40) scent discrimination line-ups he had watched and conducted with Preston (R 1889-1890).

Given the testimony presented, it is clear that the standard for admissibility of dog-scent testimony announced in Davis, Tomlinson, and Edwards, was properly met in this cause. Harass II's ability to both track human beings and discover and differentiate human scents in line-up situations was well documented for the trial judge by individuals with personal knowledge - Preston and Stayer. Furthermore, the dog's intelligence, training, and purity of breed were also demonstrated for the trial court's consideration in determining the admissibility of the scent determination line-up evidence. Davis v. State, supra. The trial court was also informed of Harass II's success and the confirmation thereof in a number of previous situations and of the utilization of such evidence in previous cases. Edwards v. State, supra. Finally, it should be noted that both the pre-trial and trial testimony of all individuals present at the scent discrimination line-ups unambiguously points to the fact that Harass II showed no hesitation in correctly identifying both the knife found plunged into the victim and the victim's shirt as containing the same scent as that of the Appellant in each of two (2) separate tests. Id. See also, People v. Craig, 150 Cal. Rep. 676 (Ct. App. 3d 1979).

Finally, Ramos' apparent argument that the testimony regarding Harass II should not have been admitted because the dog did not alert on

Captain Pickel who had himself touched the cigarette pack obtained from the Appellant and used as the scenting article or because the dog did not alert on a chair allegedly sat in by the Appellant in the same room on the same day is totally without basis. Harass II, as explained by his traniner, is highly trained in the area of scent discrimination line-ups. In conducting such a line-up, the dog is necessarily focused on those particular items contained in the line-up, not on the room itself or other individuals contained therein unless they themselves are part of the line-up. Indeed, the purpose of the scent discrimination is to determine the presence of a particular scent on a particular item or items, and the dog is controlled by his handler in such a manner that his intention is concentrated on those particular items only as he is led past them. Accordingly, Appellant's effort to cloud the issue with allegations that the dog if properly trained and competent should have bounded around the courtroom chasing Captain Pickle or nuzzling chairs allegedly utilized by the Appellant hours earlier should be summarily rejected.

The trial court properly allowed the introduction of testimony as to the scent line-up involving Harass II, and no abuse of discretion has been shown to overturn his determination that a sufficient predicate of the dog's reliability had been shown. See, Welty v. State, 402 So.2d 1159 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981) - the trial court has wide discretion in determining the admissibility of evidence.

POINT II

THE TRIAL COURT DID NOT IMPROPERLY LIMIT CROSS-EXAMINATION OF THE STATE WITNESS AT ISSUE.

ARGUMENT

Ramos initially contends that the trial court erred in "forcing" defense counsel to cross-examine State witness Gilmore without benefit of an errata sheet to his previous deposition. However, the State submits that it first should be noted that the defense's failure to procure the errata sheet at issue was not attributable to the trial court or the prosecution. Furthermore, the State had every right to call its witness and to examine him at the time it thought most appropriate, and defense counsel was afforded the opportunity to cross-examine him and did so. The fact that defense counsel had not obtained the errata from Gilmore's desposition did not affect his cross-examination for he questioned on the same manners upon which Gilmore was deposed (i.e., the circumstances surrounding his relating to the State certain statements made to him by Ramos) without difficulty. Indeed, as the trial judge noted, defense counsel could have questioned Gilmore at trial about any changes in his deposition testimony that were revealed in cross-examination (R 340-341).

Defense counsel's cross-examination was lengthy and in depth, and no prejudice is revealed on the record - other than mere speculation - attributable to the lack of an errata sheet (R 360-387, 394-395). Indeed, on appeal, Ramos fails to assert any specific showing of prejudice, i.e., demonstrate a particular "prior inconsistent statement" that he could not effectively cross-examine on or any other matter which could have affected

the outcome of his trial. Instead, he continues to make totally unsupported blanket assertions constituting nothing more than mere speculation as to potential prejudice. Accordingly, even if the trial judge's proper decision to allow the State to examine its own witnesses at the time it chose in its case was error, it must be considered harmless.

In fact, defense counsel could clearly have called Gilmore as his own witness to question him about any matters suggested by the changes made in the errata sheet (as they became aware of those changes the very next day) but chose not to do so.

Ramos also claims that his counsel's cross-examination was improperly limited because he was not allowed to question Gilmore on where he was taken to eat lunch during the trial. Apparently, defense counsel found some inherent bias in the fact that Gilmore was accompanied to a Ranch House restaurant during the trial; however, the prosecutor objected to the relevance of that question, and the trial judge agreed, determining that such a factor was not material:

> MR. WOLFINGER: Clarence Muzynski was taken to Ping On, he was taken to Ranch House. Now, if that's not special treatment.
>
> MR. MOXLEY: What does that have to do with anything?
>
> MR. WOLFINGER: It's special treatment.
>
> THE COURT: He cannot take him to the jail, and Idon't think there's anything material about where he went to lunch.
>
> MR. WOLFINGER: It's not material to show he is getting special treatment for his testimony?
>
> THE COURT: Not special treatment, it's not special, they take other people to restaurants, prisoners. One reason is because they don't want to put him in the jail, it's dangerous in the jail.

So, lunch no.

(R 386)

It is well established that the determination of the relevancy and materiality of evidence sought to be admitted at trial is a matter clearly within the sound discretion of the trial judge, and the State submits the trial court's decision that the fact that the prisoner Gilmore was taken to a Ranch House restaurant for lunch was irrelevant, i.e., had no materiality to the cause as nonindicative of a special bias or treatment did not abuse that discretion. Indeed, Gilmore's Ranch House repast could well have been attributable to the taste of the law enforcement officer accompanying him. At any rate, the preclusion of this Ranch House testimony can hardly be considered to have had a substantial effect on the trial so as to justify reversal. § 924.33, Fla. Stat. (1981).

Similarly, Appellant's claim that his cross-examination of Gilmore as to "prior incarcerations" was improperly limited is likewise without basis. Defense counsel asked Gilmore if he had been to prison three (3) times in the past. The prosecutor objected to the form of the question correctly noting that it was improper impeachment in that it dealt with prior incarcerations, no convictions. The trial judge agreed (R 362-365). § 90.610(1), Fla. Stat. (1981). At that point, defense counsel reformed his question and determined for the jury's benefit that Gilmore had been convicted three (3) times, and Ramos' attorney was also authorized by the trial court to bring out the fact that Gilmore was still on parole (R 365-366).

Where then is the prejudice to Ramos when the jury was in fact informed that he had been convicted three (3) times and that he was on parole? Obviously, from these facts the jury could infer that Gilmore

might try to avoid returning to prison through his testimony.

Accordingly, the error alleged (like the other evidentiary improprieties asserted by the Appellant) in refusing testimony as to "prior incarcerations" must be considered harmless since the jury was clearly made aware of Gilmore's previous convictions and the fact that he was on parole, thereby also informing them that he had been previously incarcerated. Indeed, the implication that Gilmore might be testifying to avoid further incarceration must already have been obvious to the jury from the other impeachment and cross-examination by defense counsel as to the charges pending against him and his jail status such that the bias inference sought was already well established. Reversal would clearly be inappropriate. § 924.33, Fla. Stat. (1981).

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT CERTAIN EVIDENCE SOUGHT BY THE APPELLANT ON CROSS-EXAMINATION WAS IMMATERIAL; NO REVERSIBLE ERROR HAS OCCURRED.

ARGUMENT

The question of the extent of cross-examination allowable to show a witness' bias is one resting largely in the discretion of the trial court, and its rulings will not be disturbed in the absence of a showing of a clear abuse of that discretion. Pandula v. Fonseca, 145 Fla. 395, 199 So. 358 (1940).

In Pandula, the Court opined that the material aspect of testimony by an expert as to his compensation is in the fact that he was compensated thus showing bias. Accordingly, inasmuch as the jury was alerted to that potential bias, the trial court in that case did not abuse its discretion, and the defendants suffered no prejudice when the court refused to allow testimony as to the exact amount of that compensation. See also, Langston v. King, 410 So.2d 179 (Fla. 4th DCA 1982) - trial court's refusal to allow appellee's expert to be questioned as to specifics of agreement for compensation was harmless error.

Here as in Pandula, the trial court did not abuse its discretion in finding irrelevant the amount of per diem paid to Preston by the State for his scent discrimination line-up work and his in-court testimony. The jury was obviously made aware of the fact that Preston was paid both for his work and his testimony, and any potential bias was therefore revealed. Thus, no reversible error has occurred. Langston v. King, supra; § 924.33, Fla. Stat. (1981).

In addition, the State notes that inasmuch as the Appellant failed to proffer the specific testimony as to the amount of compensation paid Preston, he has failed to preserve the issue for intelligent appellate review since it is now impossible for this appellate court to evaluate even the possibility of prejudice to Ramos since the specific testimony excluded is not known. See, § 90.104(1)(b), Fla. Stat. (1981); McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982); Ketrow v. State, 414 So.2d 298 (Fla. 2d DCA 1982); Llamos v. State, 401 So.2d 848 (Fla. 5th DCA 1981).

POINT IV

THE TRIAL COURT DID NOT ERR IN PERMITTING TESTIMONY REGARDING THREATS MADE TO A STATE WITNESS WHERE SUCH TESTIMONY WAS INVITED BY PRIOR QUESTIONING BY DEFENSE COUNSEL AS TO THE WITNESS' BIAS AND WAS NECESSARY AND RELEVANT TO REBUT THAT TESTIMONY AS TO ALLEGED PROMISES AND BENEFITS INMATE WOULD RECEIVE FROM TESTIFYING.

ARGUMENT

Absent an obvious showing of error, this Court should not tamper with a trial judge's determination of admissibility. Jones v. State, 440 So.2d 570 (Fla. 1983).

To properly evaluate the correctness of the trial judge's decision that jail inmate Gilmore's testimony as to the danger he faced from other inmates as a "snitch" was relevant and therefore admissible, an examination of the total context of Gilmore's testimony is necessary.

Defense counsel's cross-examination of Gilmore was clearly intended to show a potential bias or interest on his part in that his testimony against Ramos could benefit him in the eight (8) charges pending against him for which he was incarcerated. Ramos' attorney also attempted to impeach Gilmore's testimony by noting that the inmate had hesitated to tell a number of individuals - including his own public defender - of Ramos' admission (R 382-384). Defense counsel further noted that Gilmore had achieved "trustee" status at the jail after informing authorities of Ramos' jail-house admission, in an obvious attempt to have the jury infer that he was receiving benefits for this testimony.

In response, the prosecutor attempted to rehabilitate Gilmore's

credibility by pointing out for the jury that although defense counsel wanted the jury to focus on alleged benefits Gilmore would receive [although the witness specifically noted that he had not been promised anything (R 396)] for providing testimony, that potential bias or interest must be balanced by the danger that a "snitch" encounters from other inmates in a jail or prison when he provides evidence for the State (R 388-390). Indeed, Gilmore's testimony about the threats he had received when read in context with the entire line of questioning reveals that it in no way mentioned or inferred a threat from Ramos individually but from other inmates of the jail and the state prison system.

This testimony was relevant to fully explain the circumstances surrounding Gilmore's decision to testify in that it allowed the jury to properly judge his credibility by balancing the competing interest playing on Gilmore's psyche [i.e., the possibility of receiving benefits from the State (e.g., trustee status and the hope for assistance in his pending charges)] versus the potential danger from other inmates for being a "snitch" (as exemplified by the threats received) as well as being ostracized by his fellow prisoners. Indeed, this fear factor was also relevant to explain Gilmore's hesitance and delay in coming forward with Ramos' admissions (R 390).

This is not therefore a case comparable or even similar to Reeves v. State, 423 So.2d 1017 (Fla. 4th DCA 1982), or Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980), upon which the Appellant relies. In fact, the factual circumstances sub judice easily distinguish the instant cause from those cited by Ramos for here the clear purpose of the evidence was not to "insinuate in the minds of the jury that Appellant was guilty because someone had threatened the witness" as in Jones, but to counter defense

counsel's claims of bias on Gilmore's part by showing that the inmate's testimony was also detrimental (as opposed to beneficial) to him due to threats received from inmates (other than Ramos) and the generally detrimental treatment that a "snitch" received in jail or prison. Thus, the relevance of the "threats" testimony at issue, once the purpose and context of that testimony is revealed, becomes evident.

POINT V

THE TRIAL COURT DID NOT ERR IN ALLOWING A PHOTOGRAPH OF THE VICTIM AND HER HUSBAND INTO EVIDENCE.

ARGUMENT

The Appellant claims that the trial court erred in allowing a photograph of the victim and her husband to be introduced into evidence at trial because that photo was not relevant to any issue at trial and was so prejudicial to him as to require reversal. The State disagrees.

This Court has repeatedly held that even gory gruesome photographs may be admitted into evidence as long as they pass the basic test of admissibility, i.e., relevance. Engle v. State, 438 So.2d 803 (Fla. 1983); Adams v. State, 412 So.2d 850 (Fla. 1982); Welty v. State, 402 So.2d 1159 (Fla. 1981); Foster v. State, 369 So.2d 928 (Fla. 1979). Furthermore, the question of relevance is not one of necessity and, in fact, photographs can be relevant to a material issue either independently or by corroborating other evidence. Straight v. State, 397 So.2d 903 (Fla. 1981).

In addition, the admissibility of photographic evidence, like other evidentiary relevance questions, is a matter for the trial court to determine in its broad discretion, and a trial judge's ruling on such admissibility will not be disturbed on appeal absent a clear or patent abuse of that discretion. Courtney v. State, 358 So.2d 1107 (Fla. 3d DCA

1978); Phillips v. State, 351 So.2d 738 (Fla. 3d DCA 1977); see also, Welty v. State, supra; Booker v. State, 397 So.2d 910 (Fla. 1981).

The photograph at issue is simply a portrait of the victim and her husband (R 25-27). As such, it is not oversized nor is it, as the trial court clearly determined, inflammatory (R 245). In fact, the trial judge correctly noted that the jury was aware that the victim was married, and the State further noted that her husband would actually take the stand at trial such that the jury would surely be apprised of both such facts (R 245-246). In addition, the prosecutor noted that the picture was necessary to show the victim in the state in which she existed before the brutal murder, i.e., as she normally appeared, such that the exact nature of the injuries suffered in her brutal murder would become more obvious to the jury (R 245). In addition, despite defense counsel's willingness to stipulate to identity, the prosecutor refused to accept that stipulation, a decision clearly within his right, such that the issue was one to be proved and for which the photograph was surely relevant. See, Engle v. State, supra; Foster v. State, supra. Here, as in Engle, the State was free to choose those photographs which it wished to use to meet its burden of proof. Furthermore, the size of the photographs was properly rejected by the trial judge as a basis for exclusion in that the photo itself was a color portrait such that its size was not "unreasonably enlarged". Id., 433 So.2d at 809.

Accordingly, the State submits that Ramos' argument that his murder conviction should be reversed because of the allegedly egregiously prejudicial nature of the photograph at issue is meritless. The photograph was relevant to prove both identity and to aid the jury in determining the true nature of the injuries that had befallen the victim. Furthermore, there

was nothing inherently prejudicial in the photograph in that the jury was well apprised that the victim was married and would in fact see the husband himself testify. What then was the great prejudice suffered by the Appellant?

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CERTAIN TESTIMONY BY STATE WITNESS PRESTON AS RELEVANT FOR SAID TESTIMONY HELPED ESTABLISH THE COMPETENCE AND QUALIFICATION OF SAID WITNESS TO RENDER EXPERT OPINION TESTIMONY; FURTHERMORE, APPELLANT HAS FAILED TO PROPERLY PRESERVE THE ISSUES HE NOW RAISES FOR APPELLATE REVIEW AND HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR.

ARGUMENT

Absent an obvious showing of error an appellate court will not tamper with a trial court's determination as to the admissibility of evidence since the lower tribunal is vested with broad discretion in determining the admissibility (i.e., relevance) of evidence. Jones v. State, 440 So.2d 570 (Fla. 1983); Welty v. State, 402 So.2d 1159 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981).

Similarly, while a showing must be made that an expert witness is qualified by knowledge, skill, experience, training or education to express an opinion, § 90.702, Fla. Stat. (1981); Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977); it is also well established that it is within the province and broad discretion of the trial judge, not the jury, to determine the competency/qualification of an expert and the range of subjects upon which his expert opinion testimony will be allowed and absent a clear showing of error or abuse of that discretion the trial court's decision will not be disturbed on appeal. Johnson v. State, 393 So.2d 1069 (Fla. 1981); Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982); Rodriguez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982). Thus, the trial court's determination of the competency or qualification of an expert is considered

a question of law, not fact. Tully v. State, 69 Fla. 662, 68 So. 934 (1915); Daniels v. State, 381 So.2d 707 (Fla. 1st DCA 1979), affirmed, 389 So.2d 631 (Fla. 1980).

It is clear from the record in this case that Ramos did not consider John Preston as an expert in the field of dog-scent discrimination and tracking; accordingly, the State was presented with the burden of showing Preston's competence and qualification to testify as an expert in the field of dog-scent line-up identification so as to allow the introduction of his testimony as to such indentifications in general as well as the specific line-ups conducted with his dog, Harass II, in this case (R 1235-1241). The question at issue was asked of Preston during the preliminary questioning by the prosecutor to establish Preston's expert status. Preston noted that he had previously engaged in scent discrimination line-ups utilizing dogs and that he had previously testified as an expert in the field (R 1237-1239). The prosecutor then questioned Preston as to whether any state appellate courts had affirmed convictions based upon his expert testimony, and defense counsel objected:

> Q. What is a scent discrimination line-up, sir?
>
> A. Scent discrimination line-up is utilizing a dog in scenting him on a known or a controlled scent, and then having him search various objects and establish on or within which object that scent is working.
>
> Q. Have you ever testified as an expert in the area of line-up scent discrimination?
>
> A. Yes, I have.
>
> Q. Have Appellate Courts in any state affirmed convictions based upon your testimony?
>
> MR. RUSSO: Objection, your Honor, there's many reasons for affirmance, and it might be affirming over the error of his dog, we don't know.

THE COURT: Objection overruled, he can testify.

Q. (By Mr. Moxley) Has your name been mentioned by the Supreme Court of Virginia?

A. Yes, it has.

Q. Has you dog's name been mentioned?

A. Yes, it has.

Q. The Court of Appeals and Federal Court, have you and your dog been mentioned in a case involving a scent discrimination line-up?

A. Yes, we have.

(R 1237-1238)

Initially, the State notes that the question objected to by defense counsel was never answered by Preston; indeed, the prosecutor modified his question after defense counsel's objection to the "affirmance" language and simply asked Preston whether he and his dog had ever been mentioned by the Supreme Court of Virginia and certain other courts (R 1238). No objection of any kind was raised by defense counsel to either the form or relevancy of the prosecutor's reformed questions or the answers provided, clearly indicating that counsel was satisfied with the amended form of the question propounded by the prosecutor. Given this apparent acquiescence and total lack of objection to the amended form of the questions asked following the objection raised by defense counsel, Ramos has clearly failed to preserve any challenge to this question for appellate review. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

More importantly, Appellee submits that the trial court did not abuse its broad discretion in the admissibility of testimony in determining that the specific question at issue was relevant. Preston's qualification and competence as an expert in the field of dog-scent discrimination line-ups

was clearly at issue, and the State was therefore given the burden of presenting evidence of his special skill, knowledge, experience, etc., in that field so as to establish his "expert" status. Clearly, if an appellate court of another state had specifically utilized Preston's expert testimony in that field as the basis for affirmance of a conviction, that fact would certainly have been admissible, as the trial court clearly determined within its broad discretion in this case, as relevant to the issue of Preston's expert status. Indeed, such evidence is no less relevant that Preston's testimony as to his previous trial court appearances in which he had testified as an expert.

Obviously, the purpose of such testimony was to establish a previous acceptance of Preston's expert status by other authorities and tribunals so as to show a basis for admitting his expert testimony in this cause. Accordingly, where a state appellate court had in fact embraced Preston's expert testimony as properly admitted by a lower court and as competent substantial evidence for affirming a conviction, that fact was certainly as probative to the trial judge in evaluating Preston's "expert" status as the fact that he had previously testified in various other state trial courts. See, Epperly v. Commonwealth, 294 S.E.2d 882 (Va. S.Ct. 1982) - Virginia Supreme Court determined that the trial court properly allowed testimony as to tracking and scent discrimination line-ups performed by Preston's German Shepherd and noted Preston's qualification as an expert by the trial court in the training, handling and breeding of tracking dogs; dog tracking evidence was properly admitted to support conviction. It is clear from the context of the question at issue that the prosecutor was seeking simply to provide for the trial judge's edification evidence of Preston's qualifications and competence in the field of dog-scent line-up

discrimination by making the court aware that Preston's testimony had been utilized in both trial and appellate courts. The trial court's decision to consider such evidence did not constitute an abuse of the trial court's broad discretion in determining the admissibility (relevance) of evidence and the competence/qualification of an expert witness. No clear showing of error in the exercise of that discretion has been made, and this Court should not therefore disturb it on appeal. Jones v. State, supra; Welty v. State; Johnson v. State, supra.

Furthermore, Ramos' assertion that the trial court had sustained earlier objections to "similar" questions asked of Kenneth Stayer, the other dog expert, is of no consequence for there the trial court sustained the objections based only on the form not the relevancy of the question (R 1182). In addition, the questions asked of Stayer differed from that asked of Preston in that the questions to Stayer were vague and did not specifically tie in his expert testimony to the appellate cases as the basis for affirmance of conviction. Furthermore, the trial court specifically noted that the question could be asked if properly rephrased. Id.

Finally, the Appellant's claim of reversible error due to alleged jury prejudice is, like his other arguments herein, without basis.

As previously noted, it was within the trial court's discretion to accept evidence as to the utilization or discussion of Preston's expert testimony by appellate tribunals since such testimony could certainly be viewed as relevant in establishing his competence or qualification as an expert. Indeed, that was the specific purpose of the questions and answers at issue, i.e., said questions were propounded merely as a basis for the trial judge to make a ruling on a question of law as to Preston's expert

status, and for that limited purpose the said questions and answers were obviously relevant. No objection to the fact that the questions and answers might also be heard and considered by the jury was ever raised by the Appellant; indeed, no specific contemporaneous objection as to the relevancy was ever made to the specific questions asked and answered.

Since the questions asked and the testimony adduced as to the notation by certain appellate courts of Preston and his dog were propounded merely for the trial judge's consideration of a question of law (Preston's competence as an expert), his instruction to the jury - which the Appellant now claims prejduiced him - was clearly proper inasmuch as it informed the jury that the question as to how other courts of law had dealt with scent identification by a dog was a question of law and not of fact such that the jury should not be concerned with such issues (R 1605-1606). This instruction clearly informed the jury that they were not to concern themselves with how other courts had dealt with dog-scent identification evidence; thus, even if the questions at issue were determined to have been in error, the trial judge's instruction necessarily cured any such error by informing the jury that such evidence was to have no part in their decision. Furthermore, that ruling was clearly a proper statement of the law for the utilization by prior courts (including appellate tribunals) of Preston's expert testimony was a matter to be considered by the trial court in its determination of Preston's expert status, which determination was clearly a question of law not fact and one in which the jury was not to be involved.

Finally, the State notes that Appellant's objection to the jury instruction given by the trial court has not preserved the specific issue that he now raises for appellate reivew since that same question was never raised before the trial judge. See, Steinhorst v. State, supra. Specifically,

although Ramos apparently contends that some other instructuion should have been given by the trial court to the jury's inquiry, no such instruction was ever suggested or proffered by the Appellant.

Now, for the first time on appeal Ramos apparently contends that the trial court should have given some instruction in answer to the jury's questions, to wit: (1) has scent identification by a dog ever been proven to be in error in a Court of Law in the United States?; (2) has testimony in a Court of Law in the United States ever proved that scent identification by a dog was erroneous? (R 1605). It should be noted that at no time during the trial did the Appellant attempt to impeach Preston's qualification or competence by showing that his testimony or the talents of his dog had been rejected by any court either at the trial or appellate level. Thus, despite Ramos' oblique objection to the trial court to the instruction given, no substitute instruction was ever requested nor mistrial motion made such that there is no basis for appellate review of the trial court's decision. The lack of such a requested instruction is obviously based on the fact that the Appellant was aware of no cases in which appellate courts had reversed convictions based on a finding of the unreliability of dog-scent identification evidence or testimony presented by Mr. Preston.

Indeed, Appellant's belated effort to raise for the first time on appeal certain cases which he alleges were reversed upon "similar-type evidence" is easily rejected. In fact, of the three (3) cases cited one (1) actually involves an affirmance of a conviction based in part on dog tracking evidence. State v. Taylor, 395 A.2d 505 (N.H. S.Ct. 1978) - evidence that bloodhound tracked down and located defendant after forty-five (45) minutes of trailing him in the woods was properly admissible since adequate foundation

laid; and the other two (2) cases were reversed only because no proper foundation for the dog tracking evidence, which would have otherwise been admissible, was laid. O'Quinn v. State, 265 S.E.2d 824 (Ct. of App. Ga. 1980); People v. Norwood, 245 N.W.2d 170 (Ct. of App. Mich. 1976). Furthermore, none of the cases cited by the Appellant involved the competence or qualification of Preston or his dog, Harass II. In fact, at least one appellate court in this state has specifically recognized evidence of a scent discrimination line-up performed by Harass II and presented by Preston as "persuasive". Dedge v. State, No. 82-1349 (Fla. 5th DCA December 22, 1983) [9 FLW 17].

POINT VII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS CLEARLY MORE THAN SUFFICIENT TO ALLOW THE CASE TO REACH THE JURY.

ARGUMENT

The Appellant apparently contends that the trial court improperly denied his judgment of acquittal motions. The State disagrees.

Ramos' judgment of acquittal motion was short and unspecific and was in fact limited to a vague assertion that ". . . there has been insufficient evidence to connect Juan Ramos with the crime" (R 315). At the close of the defense's case, Ramos simply renewed his previous motion asserting that there was "insufficient evidence" (R 1445). The trial court, however, quickly and correctly rejected these claims inasmuch as the evidence presented was more than sufficient to allow the case to reach the jury.

It is well established that the test for the granting of a motion for judgment of acquittal is a strict one in that the trial court must not grant such a motion unless there is no legally sufficient evidence on which the jury might base a verdict of guilt. Downer v. State, 375 So.2d 840 (Fla. 1979); Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982); Brewer v. State, 413 So.2d 1217 (Fla. 5th DCA 1982). Furthermore, in evaluating an appellant's motion for judgement of acquittal, all facts introduced into evidence are considered admitted, and the lower court must draw every conclusion and inference therefrom in favor of the State. Codie v. State, 313 So.2d 754 (Fla. 1975); Jackson v. State, supra; Brewer v. State, supra. Accordingly, as this Court noted in Lynch v. State, 293 So.2d 44, 45 (Fla. 1974):

> The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. . .

(citations omitted) (underscoring supplied)

The proper test on appeal of a denial of a motion for judgment of acquittal is whether the jury as the trier-of-fact might reasonably conclude that the evidence excluded every reasonable hypothesis but that of guilt, taking into consideration that all facts introduced into evidence are admitted by the defendant and that the court must draw every conclusion favorable to the State. Jackson v. State, supra.

The evidence adduced in this case was more than sufficient to allow the case to reach the jury and to sustain their verdict of guilt. Furthermore, Appellant's apparent argument that the evidence adduced against him was "wholly circumstantial" is clearly untrue in light of Ramos' confession to his cellmate, James Gilmore, that after going to his job and learning that he had been fired the Appellant got mad and went to the victim's house to pick up something (R 349). The Appellant told Gilmore that when the victim came to the door she was "looking good" and that when he entered the residence she became scared and started to scream so loud that "anybody could have heard the bitch" (R 350). At that point, Gilmore noted Ramos went "pow, pow, pow, with his hands", a statement which although not

verbal could clearly have been interpreted by the jury as trier-of-fact as an admission that the Appellant had repeatedly stabbed the victim to silence her. Gilmore further noted that Ramos had indicated that the victim "looked good" and that he wanted to "screw her". Id. The Appellant also told his cellmate that the police thought that he took a certain route back to his home after the murder; Ramos, however, told Gilmore that he went back to his home the "same way" and then drew a diagram for Gilmore of the path he took (R 352-353). Finally, Gilmore noted that Ramos had told him that he had washed up after the killing and returned to bed with his wife (R 353).

Clearly, this was not a "wholly circumstantial" case such that the special standard of review present in Jaramillo v. State, 417 So.2d 257 (Fla. 1982), and McArthur v. State, 351 So.2d 972 (Fla. 1977), have no application herein. Ramos' confession is, and could certainly be considered by the jury as, direct evidence of the crime such that the circumstantial evidence rule is inapplicable. See, Michael v. State, 437 So.2d 138, 141 (Fla. 1983).

Furthermore, Ramos' confession as related to the jury by Gilmore was clearly bolstered by other competent substantial evidence indicative of his guilt. For example, the discrimination tests conducted using a trained dog revealed the Appellant's scent on both a knife left embedded in the victim's body as well as on the shirt worn by the victim (R 1132, 1138, 1252, 1253). A witness observed a man whom he described as Cuban running in an area next to the victim's house, and a neighbor of the victim stated that she had seen the Appellant running toward his house at approximately 8:15 a.m. on the date of the murder (R 949, 958; 983-984, 1004).

Other testimony revealed that the Appellant had often viewed the victim from his place of employment using a pair of binoculars and that he had commented to others as to how good looking the woman was and as to how he would like to make love to her (R 550, 563-564). The Appellant was acquainted with the victim and had contracted with her to purchase a bottle of Amway industrial cleaner. An investigation of the murder scene revealed that the victim's Amway accounts book was opened to the Appellant's name and that a can of industrial cleaner was on the floor (R 277-279, 797). The Appellant admitted in police questioning that he was involved in purchasing just such a product from the victim and that he had partially paid for the product on the evening before the murder and promised to return with the remainder of the money (R 713-715).

In his statement to police, Ramos claimed that on the morning of the murder he was informed by his boss, Manny Ruiz, that he had been laid off and that he immediately returned to his home and was back in bed with his wife by 7:10 a.m. (R 705-708, 722-723). This assertion was inconsistent with the testimony of Manny Ruiz who indicated that he did not see or talk to the Appellant on the morning of the murder (R 362) and with the testimony of Doris Eastes who stated unequivocally that she had seen the Appellant running very fast toward his home at 8:15 a.m. Mrs. Eastes further noted that the Appellant was shirtless and that his shirt was apparently tucked into his back pocket (R 949-950, 957-958). Appellant, when initially interviewed, denied having any knowledge of where the victim's body was found in the bedroom; however, the next day he told the police that he had lied because his wife had told him where the body was found after reading it in the newspaper (R 740, 649). The Appellant also lied to the investigator initially when he denied knowledge of the fact that a

knife was left embedded in the victim which he later admitted that he did know (R 651-652). Finally, Ramos initially told an investigator that he had not been in the victim's bedroom; however, he later told another questioner that he had in fact been in her bedroom (R 717-718, 738-739).

Other testimony revealed that a knife found near a railroad track between the victim's and the Appellant's residence was consistent with and could have inflicted many of the victim's knife wounds. It was further noted that that knife could have come from a set given to the victim by her father. Another knife similar to that found near the railroad track was located, apparently hidden, in a woodpile at the Appellant's residence.

Michael Lukon, another cellmate of the Appellant, testified that the Appellant had returned to a cell one day after a court appearance and was very nervous. According to Lukon the Appellant stated that he was "real nervous about the faucet where he washed his hands"; however, Lukon further noted that the Appellant then changed his statement and referred to the faucet ". . . where whoever washed their hands" (R 968). Other testimony revealed that a water spigot or faucet located in the back of Ramos' garage apartment had been left running, and water was still coming from the faucet when discovered by the owner of the property on the afternoon of the murder (R 473-477). Mr. Weldon, the property owner, noted that a hose which was normally connected to the faucet had been disconnected which was unusual, and he further stated that the spigot had never been left on before (R 477-480). Weldon further noted the proximity of the garage apartment and the outside faucets thereon to the home of Mrs. Doris Eastes (R 475).

The State submits that each of these facts, when considered in

concert with one another, provided an ample basis for submitting this cause to the jury despite Appellant's unspecific motion for judgment of acquittal and that the evidence adduced at trial was more than sufficient to justify and support the jury's verdict of guilt.

The murder occurred on the morning of April 23, 1982, and the Appellant was seen running toward his home shirtless by his neighbor, Doris Eastes, on that morning. A second individual, Paul Hunter, also saw a Cuban-looking man running from the vicinity of the victim's home on that same morning. The Appellant had previously commented on the beauty of the victim and his desire to make love to her when viewing her as she sunbathed with binoculars from his place of employment in the neighborhood. The Appellant had become involved in the Amway business, despite his wife's lack of desire to do so - a business run by the victim and her husband (R 1400). In fact, Ramos had contracted with the victim to purchase some industiral cleaner (which his wife indicated they had no need for) (R 1400), and Ramos had in fact visited the victim the night before the murder to payoff a portion of the price of that cleaner promising to return with the balance later. A bottle of that same industrial cleaner was found in the Appellant's home, and the Amway purchase book was discovered open to the Appellant's name on the date of the murder. The victim was discovered lying on the bed in the bedroom of her home with seventeen (17) stab wounds apparently inflicted by two (2) separate knives, one (1) of which was still protruding from her chest. Her hands were restrained behind her back with her own shirt and the presence of semen and spermatozoa in the vaginal and rectal areas of the victim was established. The same findings indicated that the depositor of that semen was a type -0 secreter - a factor consistent with that of Appellant. Certainly, this evidence in concert with the testimony of Lukon

and Gilmore as to the admissions made by the Appellant as well as the unequivocal results of the scent test which established Appellant's scent on the large knife found still embedded in the victim's chest and on the shirt worn by the victim was more than enough to justify the jury's verdict of guilt. Furthermore, the State's case was certainly bolstered by the inconsistencies and apparent falsehoods contained in the Appellant's various statements to authorities. Indeed, his claim that he spoke with his boss, Manny Ruiz, at his place of employment on the morning of the murder and then immediately returned to his home and went back to bed with his wife was clearly rejected by the testimony of Mr. Ruiz who stated that he did not recall seeing the Appellant that morning and by the unequivocal testimony of Mrs. Eastes who saw the Appellant running very fast toward his home at 8:15 a.m. (well after the time Ramos had claimed to have returned to bed with his wife).

The Appellant's argument on appeal is truly nothing more than an attempt to attack the weight of the evidence adduced against him rather than its legal sufficiency. This effort to have this Court sit as a second jury to reweigh the credibility of witnesses and the weight (as opposed to legal sufficiency) of the evidence presented should be summarily rejected. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 102 S.Ct. 2211 (1982). Ramos' assertion that the evidence presented by the State was "entirely circumstantial" and "woefully insufficient" are equally baseless.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF SENTENCING; NO ADEQUATE SHOWING OF GOOD CAUSE FOR THE DELAY OR PREJUDICE TO THE APPELLANT HAS BEEN MADE.

ARGUMENT

As the Appellant concedes, a motion for continuance is addressed to the sound discretion of the trial judge, and his ruling thereon will not be disturbed unless a clear and palpable abuse of that discretion is shown. Williams v. State, 438 So.2d 781 (Fla. 1983); Jent v. State, 408 So.2d 1024 (Fla. 1981); Magill v. State, 386 So.2d 1188 (Fla. 1980). The State submits that no palpable abuse of discretion has been shown herein justifying this Court's substitution of its judgment for that of the trial judge below.

The trial judge sub judice carefully considered Appellant's continuance motion and argument from counsel thereon (R 1643-1657). The trial court specifically addressed each of the grounds contained in that motion noting that the only additional item he had received was the State's argument in brief as to why the death penalty should be imposed. He further noted that he had heard all the facts presented at both the trial and jury sentencing phase and questioned whether the Appellant would suffer any real prejudice from going forward (R 1644). The trial court noted that defense counsel Wolfinger had been involved in death penalty cases before such that he had a knowledge of the law in that area, and he further noted that the Appellant's argument on the aggravating and mitigating factors at issue had already been fully presented at the jury sentencing phase (R 1645-1646).

In response to the motion, the prosecutor first noted that

Appellant's continuance request was facially invalid in that it did not contain a certificate of good faith (R 1646). He further explained that the State's brief on sentencing had been served on Appellant's counsel, i.e., the public defender's office, some fourteen (14) days before and that no response whatsoever had been prepared in that two (2) week time period (R 1647).

The Appellant presents no substantial basis to this Court (nor did he at the trial court level) for overturning the trial judge's discretionary decision to refuse to continue the sentencing. The fact that one of Ramos' trial attorneys had decided to take a twelve (12) day out-of-state vacation with full knowledge that a sentencing hearing in this cause could be scheduled at any time did not serve as good cause to mandate the granting of a continuance. Indeed, the Appellant showed no reason why another representative of the public defender's office, specifically Mr. Wolfinger's co-counsels (Mr. Russo and Mr. Kutsche), could not have prepared a brief and response to the State's argument in the fourteen (14) days prior to the sentencing hearing, if they had chosen to do so; thus, no "good cause" was shown for granting the continuance. See, Jent v. State, supra.

Basically, Ramos' argument is distillable into a claim that he should have been given a continuance to allow his counsel to address the briefs submitted by the State, i.e., to counter the law and "biased" facts contained therein. Yet, the trial judge clearly stated that he was aware of the facts as adduced at trial as well as the law surrounding death penalty cases. Accordingly, there is no basis for asserting that the trial judge's sentence in this cause would have been any different no matter what response, if any, Appellant had prepared to the State's

brief. Indeed, the standard for imposition of the death penalty after a life recommendation by the jury is well ensconced in the case law of this state as indicated by this Court's holding in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) - the facts must be "so clear and convincing that virtually no reasonable person could differ." Thus, Ramos' claim of great prejudice rings hollow for the trial court was certainly aware (and indicated such) of the laws surrounding the sentencing situation at bar indicating no prejudice whatsoever to Ramos; indeed, the judge was specifically reapprised of the Tedder standard as well as more recent cases applying it in argument at the sentencing hearing (R 1712-1714).

There was no "good cause" presented to justify a granting of a continuance in this cause. The Appellant and his three (3) trial counsel were given more than adequate time to prepare a response to the State's sentencing argument brief if they so desired and to obtain Ramos' mother's presence at sentencing for whatever purpose that would have served. No even colorable justification for counsels Russo's or Kutche's failure to prepare for sentencing despite opportunity to do so was presented nor did counsel Wolfinger explain why a response to the State's brief could not be prepared even in the short period after his return from vacation and prior to sentencing.

No palpable abuse of discretion has been shown and, in fact, analysis of the trial judge's ruling and the rationale therefore clearly reveal its correctness in light of the absence of good cause for delay or prejudice to the Appellant. Jent v. State, supra; Magill v. State, supra.

POINT IX

THE TRIAL COURT DID NOT ERR IN FINDING THAT FOUR (4) AGGRAVATING CIRCUMSTANCES HAD BEEN PROVEN.

ARGUMENT

The trial judge having heard the testimony presented at both the trial and sentencing phase properly determined that four (4) statutory aggravating circumstances under § 921.141(5), Fla. Stat. (1981), had been proven (R 2256-2258). The trial judge's rulings were based on detailed factual findings included therein and amply demonstrate the applicability of each aggravating factor. Id.

> (1) THE CAPITAL FELONY WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, A SEXUAL BATTERY. § 921.141(5)(d), FLA. STAT. (1981).

Despite Ramos' assertion to the contrary, the evidence adduced was more than sufficient to support the trial judge's conclusion that the murder occurred during the commission of or the attempt to commit a sexual battery. Appellant's assertion of a "reasonable hypothesis of innocence" can itself be rejected as unreasonable given the surrounding circumstances of this case as noted by both the trial judge and the prosecutor below (R 2256-2257, 2273-2274). The fact that the victim's husband had intercourse with her on Wednesday night - some thirty-six (36) hours before the murder - is tenuous enough as explanation for the presence of sperm in the victim's vagina after the murder. However, when considered in light of other evidence presented, it becomes even more unreasonable. For example, Ramos neither acknowledges nor attempts to reconcile with his allegedly

reasonable hypothesis, the fact that the victim was discovered nude on the floor of her bedroom bound and gagged. It was evident that her clothing had been violently removed as indicated by the buttons of her blouse found on the floor and the fact that her jeans were turned inside out. These factors clearly indicated, as noted by the trial court, an involuntary sexual battery or at the very least an attempt to commit same. These factors when considered in light of Sue Cobb's conservative sexual nature and Ramos' previous statements to others as to his desire to make love to the victim all serve to color the Appellant's allegedly reasonable hypothesis of innocence as simply unreasonable. Combined with the above-mentioned evidence was the fact that semen was discovered in both the vaginal and rectal areas of the victim (R 332-334) and the presence of a strangulation mark around the neck of the victim from a macrame wedding band rope found in the bedroom (R 307-308).

Certainly these factors when considered in concert with Ramos' previous announced desire to make love to the victim and his admission to his cellmate Gilmore that the victim "looked good" when she came to the door on the morning of the murder; that he wanted to "screw her" (R 349-350); and the evidence clearly connecting Ramos to the murder (admissions to cellmates, dog-scent evidence connecting him to the murder weapon and victim's blouse, etc.) clearly support the trial judge's determination that at least an attempted sexual battery occurred as well as the rejection of any innocence hypothesis as simply unreasonable in light of the circumstances.

This Court has made it clear that its concern on evidentiary matters with relevance to the establishment of aggravating and mitigating circumstances does not involve weighing or reevaluating the evidence adduced but is instead limited to a determination as to whether there was

sufficient competent evidence of record upon which to support the trial judge's findings. Quince v. State, 414 So.2d 185 (Fla. 1982); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Applying that standard, this Court should not now substitute its judgment for that of the lower court given the obvious competent substantial evidence of record supporting it.

Furthermore, Ramos' assertion that the jury rejected a finding as to sexual battery and concluded that it had not been proven beyond a reasonable doubt because they did not convict on the felony murder charge, overlooks the obvious fact that the jury was specifically instructed to return only one verdict on the crime charged (R 1596, 2332). Thus, since the jury found Ramos guilty of the particular offense charged, i.e., first degree murder from a premeditated design, there was no reason for them to also convict on the felony murder/sexual battery ground because to do so would clearly violate the "one verdict" instructions they had been given (R 2233, 2332, 2334), and no inference can therefore be drawn that the jury found the evidence of sexual battery or attempted sexual battery insufficient.

(2) THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL. § 921.141 (5)(h), FLA. STAT. (1981).

The evidence adduced supported the trial court's determination that the victim in this cause was both scared and screaming during the encounter with the Appellant and that Ramos had at some point bound and gagged her. The victim's clothes were obviously forcibly removed, and she was placed on the floor of the bedroom of her own home where a sexual battery was perpetrated as evidenced from the presence of sperm in her vagina and semen in both her vagina and rectum (R 332-334). Expert testimony revealed that the victim was conscious and moving as she was viciously

stabbed and slashed some seventeen (17) different times in the breast and neck area with two (2) different knives (R 538-540, 304-317). One of the knives, which was approximately eleven (11) inches in length was left embedded in the body of the victim, and expert testimony indicated that the victim was alive when that knife was thrust into her body (R 309-310, 314-315).

From this evidence alone, it is clear that the victim must have endured great pain as Ramos sat on her on the floor stabbing and slashing her body as she moved apparently attempting to avoid the blows (R 538-540). Also indicative of the heinous, atrocious and cruel nature of the killing were the facts that this attack occurred in the victim's own home and encompassed both the forcible removal of her clothing, and a multiple sexual battery of the victim, along with the restraint and gagging of the victim at some point in time.

The Appellant contends that the murder in this case has not reached the level of atrocity and consciousless killing identified in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The State disagrees.

Ramos' mere speculation that the victim could have lost consciousness before the infliction of the knife wounds is contradicted by testimony from the State "blood splatter" expert who revealed that the victim was clearly moving as the wounds were struck as the perpetrator sat upon her. This factor in and of itself is adequate to support the trial judge's finding. See, Morgan v. State, 415 So.2d 6 (Fla. 1982); Rutledge v. State, 374 So.2d 975 (Fla. 1979). Moreover, this finding is even further bolstered by the obvious sexual battery of the victim in her own home accompanied by the forcible removal of her clothing and the restraint and gagging of her in apparent response to her screams of anguish

and terror which the Appellant himself characterized as so loud that ". . . anybody could have heard the bitch . . ." (R 350). Certainly, such a crime is above the "norm" of capital felonies, i.e., a murder unnecessarily torturous to the victim so as to justify the application of this aggravating circumstance. State v. Dixon, supra; See also, Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Quince v. State, 414 So.2d 185 (Fla. 1982).

Additionally, the State submits that this case clearly fits within the mold of decisions wherein the victim was subjected to great agony over the prospect of her own death. Preston v. State, No. 61,475 (Fla. January 19, 1984) [slip opinion]; Routly v. State, 440 So.2d 1257 (Fla. 1982). Here the victim knew well her assailant and certainly became aware of her impending doom from the moment he accosted her. Clearly she must have speculated that he would not allow her to live and tell the tale of his assaults upon her. Her anguish over the situation was documented by Ramos' own admission to his cellmate of her loud screams. Finally, her realization that she would soon be dead must have become obvious as he approached with the knife and began plunging it into her as she writhed in pain.

Here then the trial court's finding of the conscienceless pitiless and unnecessary torturous killing can be sustained under the totality of the circumstances presented upon both the torturous manner of the killing itself and the pain unnecessarily felt by the victim, as well as the anguish she must have suffered in contemplating her impending death. See, Mason v. State, 438 So.2d 374 (Fla. 1983); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Stevens v. State, 419 So.2d 1058 (Fla. 1982).

Finally, the State notes that the cases relied upon by Ramos are totally inapplicable to the issue because in each one this Court did

not overturn the trial court's finding that the killing was heinous, atrocious and cruel but resolved the case on other grounds. See, Burch v. State, 342 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976). Furthermore, the Halliwell v. State, 323 So.2d 557 (Fla. 1975), decision relied upon by Appellant is clearly distinguishable from this case since the heinous cutting and dismembering of the defendant present in that case was found to have been inflicted after death, not while the victim was conscious and moving as in this case.

> (3) THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSES OF AVOIDING OR PREVENTING A LAWFUL ARREST . . . § 921.141(5)(e), FLA. STAT. (1981).

As Ramos correctly notes, this Court in Riley v. State, 366 So.2d 19 (Fla. 1978), determined that the aggravating circumstance outlined in § 921.141(5)(e) is not limited to the killing of law enforcement personnel but can include the killing of a mere witness to a crime, although proof of a requisite intent to avoid arrest and detection must be very strong in such cases.

The evidence adduced clearly revealed that the victim knew Ramos very well and in fact was an Amway business associate of the Appellant. Thus, it is clear that Ramos knew the victim could certainly identify him as the perpetrator of the sexual battery upon her if she were allowed to do so. Furthermore, Ramos admitted to cellmate Gilmore that his murderous attack on the victim was motivated by the fact that she screamed so loud that ". . . anybody could had heard the bitch. . ." (R 350).

In addition, it should be noted that the fatal assault on the victim was perpetrated in a number of ways and involved both apparent strangulation as well as a brutal stabbing in which seventeen (17) different

wounds were inflicted with two (2) different knives clearly indicative of the Appellant's concern in assuring that Sue Cobb was dead and thus could not identify him as the perpetrator.

This Court has previously stated in a number of cases that the killing of a potential witness who could have identified the defendant as the perpetrator of a crime will support a finding that the murder was committed for the purpose of avoiding or preventing arrest. See, Routly v. State, 440 So.2d 1257 (Fla. 1983); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Martin v. State, 420 So.2d 583 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982).

In Lightbourne, the Court emphasized that the defendant knew the victim personally. In Routly, the Court recounted a number of cases in which it had determined that this aggravating factor applied notwithstanding the lack of an express statement that the killing was motivated by a desire to avoid arrest, and the finding of an aggravating circumstance under (5)(e) was again upheld based on the fact, inter alia, that the defendant knew that the victim knew him.

In this case too the Appellant obviously knew the victim knew him and could identify him as the perpetrator of the sexual battery upon her; furthermore, Ramos' admission to Gilmore clearly evinces the fact that the murder was motivated to prevent the victim's screams from alerting anyone and thus to avoid arrest. These factors, especially when considered in concert with Ramos' obvious willingness to go to great lengths to avoid incarceration as evidenced by his own admission that he had previously cut off two (2) of his own fingers to avoid going to prison in Cuba provide evidentiary proof strong enough to justify the trial court's factual finding as to this circumstance (R 2257-2258). Routly v. State, supra; Riley v.

State, supra.

> (4) THE CAPITAL FELONY . . . WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. § 921.141(5)(i), FLA. STAT. (1981).

Both the prosecutor and the trial judge noted the factors that established the cold, calculated and premeditated manner of the killing, including the forcible removal of the victim's clothing; the sexual battery of the victim; the Appellant's restraining and gagging of the victim; and the fact that she was choked by Ramos with a rope and was also stabbed some seventeen (17) times with two (2) different knives (R 2257, 2275-2276). The State submits that this evidence supports a finding of this aggravating circumstance for this episode involved a lengthy, methodic and involved series of atrocious events indicative of the cold and calculated nature of the killing perpetrated by Ramos. See, Preston v. State, supra; Jent v. State, 408 So.2d 1024 (Fla. 1981). Here, as in Mason v. State, 438 So.2d 374 (Fla. 1983), the Appellant brutally attacked and stabbed the victim in her home as she lay helpless (in this case, restrained and gagged and pinned under the Appellant's body on the floor of her bedroom) without any pretense of moral or legal justification. The restraint, gagging and sexual battery of the victim in concert with the strangulation marks on her neck and the seventeen (17) different stab wounds inflicted on her chest and neck by two (2) different knives supply ample evidence of the cold and calculated manner of the killing and of Juan Ramos' obvious efforts to assure himself that the victim was dead.

Finally, the State notes that even should this Court find that one or more of the aggravating circumstances were improperly found, no

resentencing hearing is necessary if at least one aggravating factor remains, inasmuch as there were no mitigating circumstances determined. See, Preston v. State, supra; Harris v. State, 438 So.2d 787 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Elledge v. State, 346 So.2d 998 (Fla. 1977). This is true even in cases, such as this one, where the trial judge overrides a jury recommendation of life imprisonment. Bolender v. State, 422 So.2d 833 (Fla. 1982) - death penalty affirmed despite jury override and subsequent rejection of two (2) aggravating factors on appeal.

POINT X

THE TRIAL COURT DID NOT ERR IN CONSIDERING AND REJECTING MITIGATING FACTORS AT ISSUE AND IN IMPOSING A SENTENCE OF DEATH.

ARGUMENT

The trial judge's sentencing order reveals specific factual findings as to each statutory and nonstatutory mitigating circumstance at issue (R 2258-2259). The State submits that the trial court's rejection of the various mitigating circumstances argued and its factual bases therefor are amply supported by the evidence adduced at the trial and sentencing phase.

(1) THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

Despite Ramos' contention to the contrary, it is clear that the trial judge did reject the mitigating factor outlined in § 921.141(6)(a), Fla. Stat. (1981), i.e., that the trial court determined that the defendant did not lack a significant history of prior criminal activity and did so correctly based on his specific factual finding that the defendant: had previously been incarcerated in Cuba for assault; had committed a second assault on another inmate while in prison there; and had been observed in possession of a "brass knuckle knife" while imprisoned in the Brevard County Jail (in violation of state law), which knife was apparently contemplated for use on yet another prisoner. From the tenor of the judge's language in his specific finding as to the assaults, Ramos' previous prison incarceration, and a specific notation of the Appellant's violation of Florida law while in prison, it is obvious that the trial court was documenting its basis for rejecting that mitigating factor. This view is bolstered by the fact that the specific episodes outlined in Ramos'

prior significant criminal conduct had been argued by the prosecutor as the basis for rejecting that mitigating factor (R 2277-2278).

Ramos next argues that the presence of a significant history of prior criminal activity was not sufficiently proven. Obviously, the Appellant has the burden of proof backwards for he must show that a mitigating factor applies on his behalf (R 2226). In raising this sufficiency challenge, Ramos attacks the credibility of State witness Gilmore as to the "brass knuckle knife" in Ramos' possession in the county jail, as well as the trial court's evaluation of the assaults Ramos perpetrated in Cuba arguing, inter alia, that no criminal convictions were shown (despite the fact that Ramos was obviously imprisoned for the assault on a Cuban government official).

Convictions are, of course, unnecessary to negate this factor. Smith v. State, 407 So.2d 894 (Fla. 1982); Washington v. State, 362 So.2d 658 (Fla. 1978). Furthermore, this Court has consistently noted that it is within the trial court's province to decide whether a mitigating circumstance has been proven. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Riley v. State, 413 So.2d 1173 (Fla. 1982). Indeed, there is no requirement that a trial judge find anything in mitigation, only that he consider all factors advanced; furthermore, mere disagreement with the force to be given evidence adduced is an insufficient basis for challenging the sentence imposed. Porter v. State, 429 So.2d 293 (Fla. 1983); Quince v. State, 414 So.2d 185 (Fla. 1982).

The clear purpose of this mitigating factor is to evaluate the defendant's conformance with law. Ramos' conduct clearly exhibited a disrespect for the law as it was established in both Cuba and the United

States and as such could certainly be relied upon by the trial court to arrive at the view that the Appellant's criminal history was "significant". The assaults perpetrated by Ramos were indicative of his penchant for illegal violent conduct and his illegal possession of a homemade knife fashioned to do bodily injury to another inmate at the county jail served to confirm that evaluation. Furthermore, Ramos' attempt to explain away the assaults was obviously rejected by the trial court as fact-finder, perhaps as an evaluation of the demeanor and credibility of the witness on the stand, or as a result of confirmance of the Appellant's violent nature revealed by the discovery of the illegal homemade brass knuckle knife in Ramos' possession, which knife was clearly intended for further violent activity.

Simply put, the fact that Ramos does not consider the State's evidence in rebuttal "credible" is of no consequence in this Court's review of the trial court's rejection of the mitigating circumstance at issue (AB 55). Inasmuch as the trial court's evaluation was based on adequate evidence adduced of record, there is no basis for this Court to substitute its judgment for that of the lower tribunal.

(2) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME. § 921.141(6)(g), FLA. STAT. (1981).

The trial court also rejected Ramos' age (twenty-five (25) years old) as a mitigating factor noting that he had also been married for several years and had previously been incarcerated in a Cuban jail - apparent reference to the Appellant's maturity. Ramos now asks this Court to substitute its judgment for that of the trial judge who himself heard Ramos testify and could therefore evaluate his demeanor, mental presence and maturity firsthand. The Appellant claims that because he was ". . . thrust into this strange environment . . ." (the United States) and could not speak English

the trial court's evaluation of his maturity and age as a mitigating factor should be reevaluated. This argument is incomprehensible for certainly the "customs of his newly-adopted country" could not have led Ramos - a twenty-five (25) year old married man who had been previously jailed for assault and thereby apprised of the fact that such violent conduct was not acceptable - to believe that the brutal sexual battery and murder in this case was somehow acceptable (AB 56). Clearly the fact that Ramos' English was not perfect (although he managed to communicate to police officials and the trial judge in this cause) does not make him any less responsible for the brutal murder at issue.

This Court has consistently held that no per se rule pinpoints particular age as a factor in mitigation, Peek v. State, 395 So.2d 492 (Fla. 1981); however, one is considered an adult responsible for one's conduct at the age of eighteen (18) years. Songer v. State, 322 So.2d 481 (Fla. 1975). Suffice to say the rejection of this mitigating factor has been upheld by this Court in comparable cases. See, Mason v. State, 438 So.2d 374 (Fla. 1983) - defendant twenty (20) years old; Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) - defendant twenty (20) years old. Peek v. State, supra.

Finally, Ramos notes that a number of nonstatutory mitigating factors were urged, e.g., that he was nonviolent, an industrious worker, etc.; however, he concedes that the trial court "acknowledged" the evidence presented on those nonstatutory mitigating issues (AB 56) and that fact is further evinced by the trial court's order wherein he specifically noted that the nonstatutory mitigating circumstances and the evidence adduced thereon were considered (R 1718, 2256, 2259).

The State once again notes that a trial judge need not find

anything in mitigation inasmuch as it is within the trial court's province to determine if a mitigating factor has been proven. Furthermore, mere disagreement with that determination and the force to be given evidence adduced on such factors is an insuffient basis for challenging the sentence. Teffeteller v. State, supra; Porter v. State, supra; Quince v. State, supra. Accordingly, Ramos' effort to have this Court sit as a de novo fact-finder and evaluator of the weight to be attached to the nonstatutory mitigating factor evidence adduced should be rejected since the trial court has already considered, weighed and rejected the evidence presented as insufficient to justify a finding in mitigation and more importantly to prevent the imposition of the death penalty in light of the aggravating factors determined.

Furthermore, the Appellant's claim that the trial judge failed to consider an alleged nonstatutory mitigating factor (i.e., that Ramos had a "difficult upbringing") because it was not specifically included in the trial judge's order is clearly contradicted by the judge's statement that it considered all such evidence, especially inasmuch as the failure to address each nonstatutory mitigating factor raised does not mandate reversal. Mason v. State, supra. At any rate, Ramos' alleged "difficult upbringing" was part and parcel of the other nonstatutory mitigating factors asserted, including his alleged industrious nature.

Finally, Ramos' argument that the allegedly weak nature of the circumstantial evidence used to convict Appellant constituted a nonstatutory mitigating factor and was itself the most compelling reason for the jury's life recommendation because of the possibility of an improper conviction was properly and clearly rejected by the trial court which found that a "very strong" case was presented against Ramos (R 2259). Indeed,

as previously noted by the State in response to the Appellant's judgment of acquittal argument herein (Point VII), the case was not wholly circumstancial but included obviously damaging admissions by Ramos to his cellmates as to his attack on the sexual battery/murder victim.

Here the Appellant's guilt was established by his conviction. As noted by this Court in Buford v. State, 403 So.2d 943, 953 (Fla. 1981):

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

As in Buford and this case, if the Appellant were not guilty beyond a reasonable doubt he should not have been convicted, but no nonstatutory mitigating factor justifying imposition of of a life sentence is presented by a claim of a "weak" case against the defendant.

POINT XI

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

ARGUMENT

In this case the trial court was made well aware of the standard of review articulated by this Court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), where a jury recommendation of life imprisonment has been overridden:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

The Tedder standard must, however, be tempered by the fact that the ultimate decision as to whether the death penalty should be imposed rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981); Hoy v. State, 353 So.2d 826 (Fla. 1978). Furthermore, death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating factors. White v. State, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973). Here, the trial judge properly utilized his position as final arbiter of the death penalty issue and determined that his consideration of the aggravating and mitigating circumstances asserted led him to the inescapable conclusion that the aggravating circumstances overwhelmingly outweighed any mitigating factors alleged such that a sentence of death was justified (R 2259). The court further determined, in accordance with Tedder, that the facts adduced were so clear

and convincing that virtually no reasonable person could differ as to the propriety for the imposition of the death penalty. Id.

Initially, the State reasserts its disagreement with Ramos' basic premise that none of the aggravating circumstances found by the trial court were applicable. Furthermore, the trial judge properly rejected the statutory and nonstatutory mitigating circumstances asserted and correctly determined that in weighing the factors presented the aggravating circumstances so overwhelmingly outweighed the mitigating factors alleged that the death penalty must be imposed. Those determinations, as well as the imposition of the death penalty, are amply supported by the specific factual findings (previously noted) included in the trial judge's sentencing order wherein, inter alia, the heinous and atrocious nature of this crime, as well as the other aggravating factors determined, were documented and the mitigating factors rejected (R 2256-2259), as well as by the case law presented by the prosecutor documenting various instances in which this Court had approved a trial judge's override of a life recommendation by the jury (R 2270-2271). Here, as the prosecutor noted, Ramos perpetrated a murder which was extremely heinous and in which four (4) valid aggravating circumstances and no valid mitigating factors upon which the jury could base a recommendation of life were present such that the death penalty was the only proper sentence (R 2270-2285).

Ramos' reliance on certain cases in which jury overrides were overturned is inapplicable for the facts adduced herein are clearly distinguishable and more appropriately aligned with the numerous cases in which this Court has affirmed just such an override. The murder in this case was a particularly brutal one involving a violent sexual battery, strangulation, and gruesome stabbing of the victim in her own home.

No statutory mitigating factors were shown, and the nonstatutory mitigating circumstances alleged were likewise properly rejected by the trial court as either unsupported by the evidence (e.g., that Ramos was truthful and nonviolent) or of no probative value or relevance (e.g., that Ramos did not "flirt"; that he was good with children; that he wore proper attire; was industrious; and that only a "weak circumstantial case" was presented) (R 2258-2259). Accordingly, as argued by the prosecutor below, given the obviously heinous nature of the crime, the presence of four (4) statutory aggravating circumstances, and the absence of probative mitigating factors, the State submits that the trial judge did not err in overriding the jury's life recommendation (R 2270-2285). Indeed, this Court has noted that jury overrides have properly been applied in cases where the murder was extremely heinous or atrocious. Buford v. State, 403 So.2d 943 (Fla. 1981). Such is clearly the case here. Furthermore, as Ramos urges, if the "most compelling reason" for the jury's recommendation of life was their determination that guilt beyond a reasonable doubt may not have been shown (AB 59), then such recommendation (as previously noted in Point X herein) was patently improper. See, Buford v. State, supra.

Many cases in which this Court has affirmed a judge's override of a jury's life sentence are obviously comparable to this case. In Hoy v. State, 353 So.2d 826 (Fla. 1977), this Court upheld the override of a jury's life sentence recommendation in a case in which only three (3) aggravating factors were proven [all of which were also found applicable in this case, i.e., murder commited during sexual battery; to avoid lawful arrest (to ensure no witnesses); and which was especially heinous, atrocious and cruel] and despite the fact that two (2) statutory mitigating factors were present, they were determined not to outweigh

the aggravating circumstances. In this case, the propriety of the jury override is even more evident than in Hoy for four (4) aggravating factors are present while no mitigating factors are appropriately applied.

Similarly, in various other cases as noted by the prosecutor, this Court has affirmed jury overrides where a number of aggravating circumstances have been found while no mitigating factors were determined applicable (R 2270-2271). See, e.g.: Routly v. State, 440 So.2d 1257 (Fla. 1983); Bolender v. State, 422 So.2d 833 (Fla. 1982); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Porter v. State, 429 So.2d 293 (Fla. 1983); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Johnson v. State, 393 So.2d 1069 (Fla. 1981). Indeed, as previously noted this Court has affirmed jury overrides even in the face of a finding of mitigating circumstances. Buford v. State, 403 So.2d 943 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981); McCrae v. State, 395 So.2d 1145 (Fla. 1981). In McCrae v. State, supra, this Court determined that the trial judge properly rejected the jury's apparent finding of a statutory mitigating circumstance and overrode its verdict where the killing was heinous in nature and three (3) aggravating factors existed. The instant case is certainly comparable for here the killing was also clearly heinous in nature, four (4) valid aggravating circumstances exist, and the trial judge properly rejected the mitigating factors asserted - including a claim that a weak circumstantial evidence case could have justified the jury's recommendation. Similarly, in Buford v. State, supra, this Court upheld the trial judge's override of a jury recommendation of life imprisonment where the heinousness and atrociousness of the crimes were evident, despite the specific finding of two (2) mitigating circumstances by the trial court. In imposing the

death sentence, this Court noted that the trial court properly rejected (as did the trial court sub judice) the defendant's argument that the jury may have imposed a life sentence because it had doubts about his guilt.

In Zeigler v. State, supra, this Court upheld the trial court's override of a jury recommendation of life despite the presence of a statutory mitigating offense and despite the fact that one aggravating circumstance was eliminated on appeal.

Finally, the State submits that the cases cited by Appellant as support for reversing the trial court's override of the jury recommendation are factually distinguishable and inapplicable to the present case. In each instance (unlike the present case), mitigating factors were clearly present upon which the jury could have reasonably based their recommendation for life imprisonment: Gilvin v. State, 418 So.2d 996 (Fla. 1982) - homosexual victim made advances toward the defendant and fight ensued in which the defendant hit victim several times with a hammer; McKennon v. State, 403 So.2d 389 (Fla. 1981) - only one (1) aggravating factor versus one (1) mitigating (age of defendant) so rational basis for jury recommendation existed; Brown v. State, 367 So.2d 616 (Fla. 1979) - defendant only sixteen (16) years old and co-conspirators received lesser penalties of second degree murder; Chambers v. State, 339 So.2d 204 (Fla. 1976) - victim was voluntarily involved with defendant in "long standing sadomasochistic relationship" which included severe and disabling beatings, one of which proved to be the ultimate cause of death; additionally defendant was under self-induced mental and emotional disturbance from drug use.

Thus, in each of the cases cited by the Appellant in which a jury override was reversed, a reasonable basis existed of record upon which

the jury might have rendered a life sentence recommendation. Such is not the case here for, as the trial court determined, no statutory mitigating circumstances enured to the Appellant's benefit, and the mitigating circumstances asserted were either unproven or inconsequential and of no probative value.

The decision of the trial court is amply supported by the record factually and evidences a proper application of the standards announced by this Court for imposition of the death penalty such that the imposition of the death penalty, notwithstanding the jury's recommendation, should be affirmed.

POINT XII

THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE FLORIDA'S CAPITAL SENTENCING STATUTE UNCONSTITUTIONAL; APPELLANT HAS FAILED TO PRESERVE THE MYRIAD ISSUES HE NOW RAISES FOR APPELLATE REVIEW.

ARGUMENT

The Appellant raises a number of varied and undetailed challenges to the constitutionality of Florida's death penalty statute. In doing so, the Appellant candidly and correctly concedes that this Court has rejected each of these challenges in the past. Appellant fails to apprise this Court, however, of the fact that the various arguments he now raises for the first time on appeal have never been presented specifically to the trial court so as to preserve them for appellate consideration by this tribunal. Indeed, Appellant's trial court challenge to the constitutionality of § 921.141, Fla. Stat. (1981), was limited to a two (2) paragraph assertion that the death penalty statute is unconstitutional because it is "not an effective deterrent to crime" and therefore "serves no useful purpose" (R 2442). In addition, the Appellant, after again noting that both the Florida and United States Supreme Courts have upheld the constitutionality of the statute, challenged the constitutionality of its application stating obliquely that ". . . the death penalty has in fact been administered and applied in a manner which is inconsistent with the premises of this Court's decisions." Id. Inasmuch as a review of the various and sundry arguments raised in Point XII of the Appellant's initial brief clearly reveals that most if not all of those issues and subissues have never been specifically presented to the trial court by motion or otherwise, they have not been preserved for appellate review under this state's contemporaneous objection/motion rule. See, Fla. R. Crim. P.

3.190(b,c); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

At any rate, the State submits that Appellant concedes each of the constitutional challenges he raises have been previously rejected. In fact, as this Court noted in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Florida's death penalty statute has been repeatedly upheld against claims of denial of due process, equal protection, as well as against assertions that it involves cruel and unusual punishment. See, Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Ferguson v. State, supra; Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Appellant raises nothing but vague, unspecific, and unsupported assertions that the capital sentencing statutes are constitutionally infirm and each such assertion should be readily rejected. For example, Ramos argues that the statute does not sufficiently define aggravating circumstances; that it fails to provide a standard of proof for evaluating aggravating and mitigating factors; and that it does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and (other unnamed) factors (AB 66-67). This Court, however, has continuously held that the aggravating and mitigating circumstances enumerated in § 921.141 are not vague and provide meaningful restraints and guidelines to the discretion of judge and jury. Lightbourne v. State, supra; State v. Dixon, supra. Furthermore, the constitutionality of the statute and the mechanics of its operation have been consistently upheld despite

numerous and varied challenges. Proffit v. Florida, supra; Spinkellink v. Wainwright, supra; Ferguson v. State, supra; Alvord v. State, supra.

Furthermore, Ramos' time-worn accusation that the death penalty by electrocution is cruel and unusual or that the failure to require notice of aggravating circumstances as well as the "arbitrary and unreliable application of the death sentence" results in a denial of due process have likewise been consistently rejected. Proffit v. Florida, supra; Spinkellink v. Wainwright, supra; State v. Dixon, supra.

Similarly, Appellant's arguments that the "cold, calculated, and premeditated" aggravating circumstance outlined in § 921.141(5)(i) makes the death penalty virtually automatic absent a mitigating circumstance is preposterous in light of this Court's consistent and clear pronouncement that such an aggravating factor does not apply in all premeditated murder cases but only under certain factual circumstances. Harris v. State, 438 So.2d 787 (Fla. 1983); Jent v. State, 408 So.2d 1024 (Fla. 1981).

The State submits that the remainder of Ramos' hodgepodge of constitutional challenges are equally unsupported, unspecific and without merit. For example, Ramos' claim that a defendant's due process rights are violated by failure to notify him of the aggravating circumstances to be utilized to justify the imposition of the death sentence has been previously raised and disposed of in Sireci v. State, 399 So.2d 964, 965-966 (Fla. 1981); see also, Menendez v. State, 368 So.2d 1278 (Fla. 1979). Indeed, as Ramos clearly concedes, each of the constitutional arguments he raises has been clearly or implicitly rejected by this Court and the United States Supreme Court, each of which have upheld both the underlying statutory framework for the imposition of a death sentence and the actual application

of that process. Accordingly, the Appellant's various vague allegations attacking the facial constitutionality of the statute as well as its operation should be rejected as without legal or factual support. Indeed, like Ramos' contention that this Court has abandoned its duty to make an independent determination of whether or not the death penalty has been properly imposed, the various contentions raised by the Appellant are totally without evidentiary support or legal basis.

CONCLUSION

Based on the foregoing arguments and authorities presented, Appellee respectfully prays this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

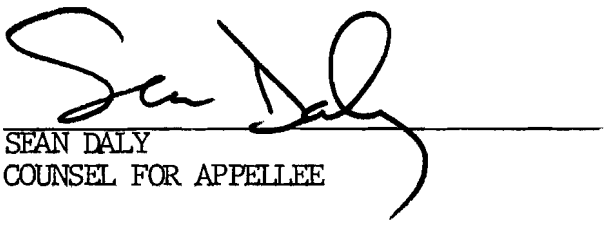
JIM SMITH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave., 4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Michael S. Becker, Assistant Public Defender for Appellant (1012 S. Ridgewood Ave., Daytona Beach, Florida 32014-6183), this 31st day of January, 1984.



SEAN DALY
COUNSEL FOR APPELLEE