IN THE SUPREME COURT OF THE STATE OF FLORIDA

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ERNEST LEE ROMAN, :

Appellant, :

vs. : CASE NO. 63,766

STATE OF FLORIDA, :

Appellee. :

______________________:

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF FACTS

The State specifically disagrees with the Statement of the Facts contained in the Appellant's Initial Brief in many respects and also wishes to invite the Court's attention to additional facts. The State also believes that in a case as serious at this, the Court should be presented with a clear picture of events in chronological sequence so that the facts of the case are eminently clear and precise. The State further wishes to comply with the Committee Note to Florida Rule of Appellate Procedure 9.210 which encourages parties to place facts utilized in the argument section of the brief in the statement of facts. Because the State finds pertinent facts omitted and disagrees not only with the numerous factual statements, but with the chronology of events themselves in many instances, the undersigned has deemed it more expedient to simply rearticulate the facts found herein in proper sequence.

I.

In March, 1981, Ernest Roman was living in a travel trailer adjacent to the trailer of his sister, Mildred Beaudoin (R 1134). Arthur Reese shared the trailer with Roman (R 556).

Chip Mogg dated Kellene Smith on and off, and on March 13, 1983, he saw her right after work at 5:30 p.m. (R 535). Kellene and Chip picked up Kellene's two year old daughter, Tasha Marie Smith, at the babysitter's and went to Mildred Beaudoin's trailer in Chip's Volkswagen (R 490;533;536). Mildred was not home, so they left and went to the ABC store, purchased a pint of vodka, and went to Chip's mother's house (R 489;513). Both Chip and Kellene were drinking that evening (R 513). They came back to Mildred's trailer around 11:00 p.m. (R 489). Tasha had a baby bottle in the back seat

and was sleeping (R 490-491). Although it was cold that night, they went inside the trailer and left Tasha sleeping in the back seat, covered with a blanket (R 390;492-494).

-II-

Mildred Beaudoin, her son Raymond Beaudoin, Arthur Reese, Kellene Smith and Chip Mogg were all gathered in the trailer (R 491). Kellene Smith testified that Roman was not present (R 491). Chip Mogg doesn't remember seeing Roman in the trailer, but stated there were two additional people in the kitchen (R 550). After about twenty minutes, Roman came into the trailer wearing a dark blue coat (R 492;557;560). Kellene Smith testified that Roman was not drunk and did not stagger or fall down (R 493). Raymond Beaudoin, Mildred Beaudoin's son, also testified that Roman had been drinking since six o'clock that night, but was not drunk (R 558;561;564;575). Arthur Reese testified that Roman was not drunk and he did not see Roman drink anything after he came into the trailer (R 609-610). Neither Beaudoin nor Reese were themselves drinking that evening (R 562;609-610). Douglas Calvert, who lives behind the Beaudoin trailer saw Roman around three or four o'clock that afternoon and Roman was drinking then. He does not know if Roman was drunk, but he did not appear to be drunk and was not stumbling or falling down and was able to carry on a conversation and understood what Calvert was saying (R 638; 1373). He did not see Roman after that time and doesn't know if he drank more that evening (R 660). Roman's sister, Mildred Beaudoin, testified that Roman was very drunk that night, and had been drinking wine for four days (R 1135). She further testified that she knew Roman was drunk, as he fell off a chair onto the floor and she had to help him up and help him out the door, telling him to go home and sleep it off (R 1136). Arthur Reese testified, however, that Roman was not drunk but was tipping back in the chair, lost his balance and fell over backwards (R 632). Wanda Pritchard, who brought Mildred

Beaudoin home that night, testified that Roman was definitely drunk, that he walked out of the trailer and fell down several times, and when she tried to help him up Roman told her that he didn't need any help and to leave him alone (R 1330).

III.

Roman stayed in the trailer for only a few minutes then walked out with a wine bottle (R 492;530;564). Raymond Beaudoin remembers Roman leaving before Beaudoin left for work (R 564). Mildred Beaudoin recalls Roman left fifteen to twenty minutes before Kellene, Chip and Arthur Reese, who all left at the same time (R 1157).

Around midnight Kellene Smith went out to check on Tasha and found she was still asleep and covered by a blanket in the back seat of the automobile. Kellene went back inside the trailer (R 494-494).

Chip Mogg left to take Raymond Beaudoin to work at a truck stop three to four blocks from the trailer (R 494). Tasha made a little noise in route, a cough or something, and Chip looked in the back seat and saw a lump but didn't want to wake her (R 538). Raymond saw a blanket on the floor, picked it up and put it on the seat and felt a baby there. He didn't see one but he could feel it (R 558). After he replaced the blanket, the baby went to sleep (R 558).

Chip Mogg returned five to seven minutes later and went back inside the trailer. Chip and Kellene stayed fifteen minutes longer then left. Mildred Beaudoin and Arthur Reese were still in the trailer when they left (R 494-495). Reese then left and went straight to bed in Roman's trailer. Roman was not in the trailer then, but came in, went to his bed for four to five minutes, then left (R 610). He did not appear drunk (R 611). On the way back Kellene and Chip ran out of gas. They also noticed that Tasha was

missing (R 540). Chip's mother came and brought him her car (R 545). When they ran out of gas, they met up with Dwayne Wolf and a companion, who went back out to the trailer with them to help them look for Tasha (R 550). First they went back to the truck stop to see if the baby had been there (R 546).

IV.

Kellene told Mildred Beaudoin that she couldn't find the baby and she started looking around for her. She looked inside the trailer, around the outside, under the trailer and in the field. Chip helped in the search but Mildred did not (R 497). She and Dwayne Wolf both looked in Roman's trailer and saw Reese, but Roman was not there (R 501). This was around 3:00 a.m. (R 587). She later saw Roman walking from the direction of the old abandoned trailer which was about 300 yards up the hill from the Beaudoin trailer. He did not appear to be drunk and was not staggering or falling down (R 499). Dwayne Wolfe testified that he saw Roman walking from the woods behind the abandoned trailer, about forty-five minutes after he had looked in Roman's trailer. He didn't believe Roman was drunk and did not detect an odor of alcohol on him. Roman was not stumbling or tripping (R 598A). Roman told them that he had not seen the baby (R 499;589A). Kellene followed him to his trailer where she asked Roman again if he had seen the baby, along with Reese and they told her they hadn't (R 500). Reese testified that Roman did not appear drunk at this time (R 611). Reese asked Roman where he had been and he said "outside." Roman left again and Reese did not see him the rest of the night (R 611). Mildred Beaudoin called the police to report the child missing about two hours after Chip and Kellene came back to the trailer (R 529-530).

V.

Tasha Marie Smith's body was discovered in a shallow grave at approximately 3:00 - 3:30 p.m. on March 14 (R 790). The gravesite was located approximately thirty-seven feet from the abandoned trailer, which was approximately 300 yards from the Beaudoin trailer (R 754). The gravesite was partially covered by a plastic refrigerator pan and a metal refrigerator ice making unit (R 780-781). Tasha was wrapped in a pink bedspread and was naked from the waist down (R 671-786). She had on only an infant tee shirt with writing on the front that said, prophetically, "growing up isn't easy." (R 794) Tasha's bottle was also recovered in the sandy grave. Her left shoe was recovered from underneath a bed in the abandoned trailer while the right shoe was found under Roman's trailer (R 772;786).

VI.

An autopsy revealed that a prominent red discoloration of tissues surrounding the vagina and the membrane that closes the vagina was torn in two places and on the inner surface was a small laceration. The smooth surface lining the distal part of the vaginal canal was also red and discolored (R 706). The findings indicated that an object larger than the hyminal opening and filling the vagina was forcibly introduced into the vagina and moved or agitated. There had to be more than just one insertion, as one insertion could tear, but the redness and discoloration indicated rubbing. The results were consistent with the repeated penetration of the vaginal area by the finger of an adult male (R 718). The stretching and tearing of the hymen would be a painful experience and the injuries were inflicted while the child was still alive, minutes before her death (R 715-716;725). Death occurred somewhere between 2:00 and 3:00 a.m. the morning of March 14, and the cause of death was asphyxiation (R 730;736). Tasha's death was an agonal event (R 729). Sandy dirt in the breathing tube and stomach indicated that she

had breathed and swallowed dirt in an effort to breathe and as she breathed while still alive, sand went down the tube (R 726-727;729). The tips of her fingernails were folded and broken with dark dirt caked underneath the fingernails, indicating a struggle (R 706). The heart would have continued to beat for a few minutes after cessation of the ability to breathe (R 730). Findings suggest she was conscious and struggling while initially smothering (R 735). They are also consistent with her having been placed alive into a sandy grave and then having sand put on top of her so that she would die underground (R 733). A small red discoloration on the right side of her head would be consistent with someone holding metal material (the grave was covered by a plactic refrigerator pan and a metal refrigerator ice making unit)over her head and applying pressure to hold the baby down in the grave (R 705).

VII.

When the ambulance went up the hill to pick up the body of Tasha Marie Smith, Mildred Beaudoin collapsed and fell down and was assisted into her trailer by Douglas Calvert. Calvert testified she immediately made a phone call to her sister and stated on the phone, "Ernest had killed a baby I reckon." (R 1371-1372).

VIII

Roman had a roadside stand and sold yard sale type items to the public (R 820). Around 2:00 or 2:30 p.m. the afternoon of March 14, Sgt. Farmer drove by there and saw Roman selling items and testified that at that time Roman did not appear to be drunk (R 811; 816).

Shortly thereafter, Sgt. Foremny spoke with Roman and asked him if he would accompany him in his patrol car back up to the crime scene, and Roman complied. At the scene, Roman sat in the back of the locked patrol car parked adjacent to the residence of Mildred Beaudoin, and was not handcuffed or

restrained (R 2019;2100;2108). He did not appear to be intoxicated and seemed in possession of his normal faculties (R 2021;2100). Sgt. Thompson sat next to Roman in the car and advised him of his Miranda rights and Roman indicated by an affirmative "yes" that he understood those rights (R 2100-2101). Sgt. Thompson asked Roman if he would voluntarily come to the Sheriff's Department for an interview and Roman responded, "yes, let's go ahead and get this mess over with so I can go to Eustis." Roman was not handcuffed in route to the Sheriff's Department (R 2102). Sgt. Thompson's encounter with Roman took place around 4:30 p.m. (R 2107).

The radio log shows that Roman arrived at the jail at 4:51 p.m. (R 2107). Sgt. Galvin spoke to Roman just after 6:30 p.m. in the investigative section at the Sheriff's office (R 2136). Sgt. Thompson does not recall Roman going into the jail portion of the building (R 2116). Sgt. Galvin stated that before Roman was brought to the interrogation room, he was somewhere about the jail, although he does not mean the confinement area of the jail (R 2155-2156).

Sgt. Galvin learned that Roman was a suspect just prior to the interview through Roman's criminal history and various records (R 2156-2157). The interview took place at 6:32 p.m. in the investigators room, which is a large open room with cabinets, desks and paraphernalia and is without steel bars or walls (R 2022;2103;2108;2137). Sheriff Adams, Sgt. Thompson and Sgt. Galvin were present during the interview and were unarmed (R 2023;2103;2137). Roman was not handcuffed or restrained and was seated in a chair (R 2069;2103). There were occasions when an officer left the room to go to the bathroom or get coffee, but two of them never left simultaneously to discuss what to do next (R 2081). Roman did not appear intoxicated, understood where he was, who he was and what was going on about him (R 2104;2142). He understood that they were questioning him and his responses were normal, logical and reasonable (R 2028).

Sgt. Galvin did not detect an odor of alcohol on Roman that evening, and his demeanor did not indicate that he was under the influence of alcoholic beverages. In his opinion, Roman was not intoxicated (R 2138). Sheriff Adams testified that Roman trembled during the interview, indicating a slight case of the shakes and the fact that Roman needed a drink (R 2074). Sgt. Thompson testified that, "it could be Roman acted like an alcoholic just coming off of a drunk." (R 2123). Adams and Thompson further testified, however, that they had seen such trembling in other circumstances and do not know if it was the result of coming off of a binge, being nervous or other circumstances, as such trembling was consistent with any number of things as well as coming off a binge, such as someone who is nervous about having committed a criminal offense (R 2094-2095). Sgt. Galvin does not believe Roman was either hung over or coming off a drunk (R 2154). Roman vomited either one or several times, depending on the testimony, during the interview (R 2083; 2120). Roman indicated in his subsequent statement that he had been smoking pot and drinking, but during the interview Roman told Sgt. Galvin that he had been drinking but had not used any pot (R 2159). Sheriff Adams believes that Roman threw up because Roman figured "the world was fixing to cave in on him." (R 2095) During the interview Roman drank coffee and water (R 2143). Sheriff Adams does not recall Roman being sleepy during the conversation (R 2081). Roman shut his eyes several times but did not appear to doze off (R 2184).

Sheriff Adams testified that he did not intend for Roman to be free to leave the investigator's room at that time were Roman so inclined (R 2036). Sgt. Thompson testified, however, that prior to the time Roman was placed under arrest, he would have been free to get up and leave if he indicated that he wished to do so, including the time during which the

statement was taken (R 2132). Sgt. Thompson was one of the officers who would decide if Roman was free to leave (R 2133). Although Sheriff Adams is his superior and would have made the final decision, Sgt. Thompson would have explained to Adams that he didn't have any alternative but to let Roman go as there was no basis to charge him at that time because he was not in custody at that point (R 2134). Sgt. Thompson or Sgt. Galvin were responsible for making decisions in the investigation prior to the time Roman was brought in (R 2031). Sgt. Galvin was the chief investigative officer during the interview (R 2143). He testified that Roman was free to go and he did not consider him to be in custody (R 2143). Sgt. Galvin stated it was possible the ultimate decision to stop Roman from leaving would have been made by Sheriff Adams, but not without strong objection by Galvin (R 2158). As a normal rule, Sgt. Galvin tells everyone he interrogates that they are free to go (R 2154).

Prior to asking questions, Sgt. Galvin advised Roman of his Miranda rights (R 2024; 2104; 2139). Roman appeared to understand his rights as they were read and explained to him (R 2023). He was asked if he understood his rights and he indicated verbally that he did understand (R 2025; 2104). From time to time, Sgt. Galvin asked Roman again if he knew his rights prior to going into the interview and Roman responded that he did understand them (R 2140). Sgt. Galvin asked Roman to sign the card that was read to him but Roman refused to sign it, stating that "he had been to Chattahoochee and he didn't have any rights." (R 2070; 2129; 2140). Throughout the course of the interrogation Roman at no time asked to speak to an attorney, nor did ne invoke his rights under the Fifth Amendment (R 2027; 2105-2106; 2144). Sheriff Adams did not recall any specific incidents where Roman stopped answering questions but Sgt. Thompson recalled, that there were

times when Roman would not answer questions or stopped answering questions (R 2071; 2122). Roman was not always responding to Sgt. Galvin's questions. Sgt. Galvin did not reread Roman the card every time he did not answer a question (R 2175-2176). When Roman did not respond to a question it was by silence and not explicit language (R 2180).

Dr. George W. Barnard testified that Roman has a history of chronic alcoholism and in all likelihood, suffers from physical damage as a consequence. Roman falls into the dull/normal level of intelligence, which is the lower end of average intelligence (R 2067). Despite this, it was Dr. Barnard's opinion that Roman had the capacity to understand and knowingly waive his rights (R 2056). The doctor's opinion was based on Roman's statement, several interviews and statements by other individuals who saw Roman close to the time of the alleged crime (R 2065). Roman's own statement indicated to Dr. Barnard that he had the capacity to understand and knowingly waive his rights as Roman indicated that he understood his rights and knew that he was a suspect in the homocide investigation (R 2056). Dr. Barnard recounted that Roman was able to give a history of being high on pot or alcohol and indicated that the reason for some of his behavior was that he wasn't up to par because of the effects of alcohol. Roman also realized he was not supposed to be at the place of the alleged crime. Roman was also able to place the blame on another party he claimed was present at the crime. Roman further remembered the details at the time of the alleged crime and was able to tell what he did after leaving the scene and going some place else. Roman knew his own emotional state at the time and stated that he felt scared (R 2056). Roman also indicated that at one time he thought of not making a statement but changed his mind. Roman indicated to the interviewer that he was aware he needed medical help

and gave his past history of being at a state hospital. Roman was also able to assess his relationship with the interviewer by stating that the interviewer had been fair and Roman had not been mistreated. During the last part of the interview Roman recalled his rights and indicated he was willing, if needed, to sign a card (R 2056-2057).

Relying on information that had been given to him, Dr. Barnard saw no overt indication of mental illness at the time of the statement and the statement itself does not indicate that Roman was suffering from psychosis or mental disease or defect, and there is no indication that Roman was intoxicated (R 2057).

At no time during the interview was physical force used against Roman, nor was his family threatened. No promises or inducements were ever made to Roman in exchange for his giving a statement, according to the testimony of the officers (R 2026-2027;2106;2142). Roman never indicated to the officers that he was injured, cold or hungry, or did not know where he was or what he was doing (R 2106;2143). Roman asked for coffee or water and it was provided for him, but he refused to eat food (R 2027;2106;2143). If Roman had asked for food or additional clothing, it would have been provided to him (R 2027). Roman appeared to understand what he was saying and what he was doing throughout the interview (R 2107).

During the interview there was some discussion about a christian burial (R 2072). Sgt. Galvin said to Roman:

> This child, if she be out there somewhere, can you tell me which direction I should walk away from that trailer so that I might find her? Don't you think it would be the right thing that anyone if they are dead, should have a christian burial? (R 2180)

Sgt. Galvin knew that the child's body had been recovered at the time he made the statement (R 2180). Sgt. Galvin did not discuss this

technique with Sgt. Thompson or Sheriff Adams (R 2180). Sheriff Adams did not feel that use of the approach would encourage Roman to make a statement and "it didn't encourage him to make any statements" (R 2084). Sgt. Galvin's intent in making the Christian burial statement was to see what response Roman would give (R 2186).

During the interview Roman used the sink, then sat down in the chair closest to the sink. Sgt. Galvin took Roman's hands in his own for perhaps a minute (R 2181).

Roman told them about the child's shoe being under the trailer he shared with Reese before breaking down and making a statement. An officer was sent to the scene and he recovered the shoe (R 2082). In his subsequent statement, however, Roman indicated that he didn't know anything about the shoes (R 2166).

The interview continued until sometime after eleven o'clock when the taped statement was made (R 2034). Sheriff Adams placed a picture of the missing baby in each one of Roman's hands and had him look at them and asked him if he had seen that baby the night before (R 2088). The Sheriff held Roman's hands when he showed him the photographs (R 2182). That is when Roman broke (R 2088). Roman said that he had seen the baby before (R 2091). Roman tried to throw up and almost succeeded. Then Roman said "the other man done it, he done it," and he started talking (R 2091).

-IX-

Roman's taped statement was made after he was given his Miranda rights and clearly informed that he was a suspect in the homocide (R 1801). In the statement, Roman accused Arthur Reese of committing the murder. Roman admitted that he accompanied Reese to the abandoned trailer

and carried the baby a short distance, but he denied participating in any sexual molestation of the victim. He alleged Reese carried the child to the back room of the abandoned trailer. Roman alleged that he encouraged Reese to get out of there, and that Reese put the child in the grave, after getting a shovel from Mildred Beaudoin's garden and digging a hole. Roman threw the baby bottle and blanket into the grave, the other man covered her up and Roman threw an old pan on top of the grave. The man then put the shovel back in the yard and Roman went down the hardtop road, drank some more wine and stayed there all night (R 851-857; 860). The "blanket" he put in the grave came out of the abandoned trailer (R 860). Roman claimed he didn't see anyone when he came back from burying the baby on the hill (R 865).

Roman stated that he was not mistreated and made an honest statement of his own free will (R 875). Although Roman had initially refused to sign the Miranda rights card, at the end of the taped interview Roman offered to sign the card several times (R 888).

-X-

On the evening of March 14, 1981, one of Roman's sisters called Attorney C. John Coniglio and advised him that Roman was being interrogated at the Sumter County Jail (R 2147). Coniglio called the Sheriff's office and asked to speak to the person who was interrogating Roman and they put Chief Floyd on the phone (R 2147). Coniglio supposedly told Floyd that he'd been asked by the family to represent Roman and he wished they would not question him (R 2147). The Sheriff came on the phone and either the Sheriff or Chief Floyd questioned Coniglio's authority to represent Roman as Roman hadn't asked for an attorney. Supposedly, he told him the family had retained him and he was insistent that Roman not be questioned. The Sheriff responded "well we're about through anyway " (R 2148).

Coniglio admitted on cross-examination, however, that he had asked Chief Floyd not to question Roman until "he had an opportunity to get an attorney to represent him." (R 2149) At that point in time, Coniglio hadn't decided whether to take the case or not (R 2150). He didn't even know what Roman was charged with and had not discussed a fee (R 2151-2152). He doesn't believe Roman's sister had even talked to Roman and did not have the express authority of Roman to contact an attorney or retain one (R 2152). He has never spoken with Roman about representation (R 2152).

Coniglio never filed a notice of appearance on behalf of Roman and never submitted a bill for services (R 2151).

-XI-

Experts determined that two pubic hairs and a scalp hair on the pink bedspread in which the body was wrapped were consistent with the pubic hairs and scalp hairs of Roman (R 937;941). Further, fibers from the clothes worn by Roman the evening of the murder were present on the victim's tee shirt (R 972). In addition, Roman's clothing contained fibers which came from the mattress cover and innerspring cover of a bed located in the abandoned trailer (R 760-761). There was no evidence to indicate the guilt of any person except Roman (R 877).

Because of Roman's statement, Arthur Reese was considered a suspect and interviewed (R 843). Scalp and pubic hair samples were taken from Reese and sent to the crime lab (R 806). Reese was subsequently eliminated as a suspect and the police were able to disprove any involvement of Arthur Reese in the murder (R 843;847).

-XII-

Roman was charged with the first degree murder and sexual battery

of two year old Tasha Marie Smith (R 1629). On April 24, 1981, the Sumter County grand jury indicted Roman for first degree murder, sexual battery upon a person under the age of eleven years, and kidnapping (R 1660).

An order was entered determining that Roman was incompetent to stand trial on July 21, 1981 (R 1852-1853). Roman filed a notice of intent to rely on the defense of insanity on July 1, 1981 (R 1715). Judge John W. Booth entered an ex parte order for further psychiatric examination on March 9, 1982, to determine whether Roman was sane at the time of the commission of the crime (R 1862-1863). Dr. Barnard concluded that had Roman not been under the influence of alcohol and drugs at the time of the crime he would have been legally sane, knowing the nature, quality, and consequences of his actions and the difference between right and wrong. Dr. Carrera was unable to reach an opinion as to Roman's sanity at the time of the offense. On November 2, 1982, it was determined that Roman was competent to stand trial (R 1920-1922).

-XIV-

The defense expert, Dr. Dorothy Lekarczyk, testified that had Roman been drunk he would not have had the ability to reason accurately, that he would not have known right from wrong, and that he would have been insane (R 1260-1261;1311). She stated that Roman was suffering from chronic alcohol syndrome resulting from excessive abuse of alcohol and that he suffered and continues to suffer from schizophrenia (R 1260). On the contrary, Lekarczyk testified that Roman would clearly have been sane had he been sober at the time of the murder (R 1304;1311). He would also have known the difference between right and wrong and had the capacity to formulate premeditation (R 1305).

On cross-examination, however, Dr. Lekarczyk admitted that

Roman's alleged memory impairment could come from a factious disorder or malingering and is characteristic of an anxiety reaction which could be caused by the stress of the fact of the kidnapping, rape and murder of the baby and being caught, placed on trial, and facing electrocution (R 1293). She further agreed that Roman had good recall in his confession statement and that it was common for a person caught for a serious crime to throw the blame on someone else (R 1294). The acts Roman confessed to all flow in a fairly logical pattern (R 1297).

If a hypothetical person had done those acts without Dr. Lekarczyk knowing Roman's history, she would agree that the person was legally sane. Roman knew the nature of his actions at the time the crimes were committed (R 1297). But for the assumption that Roman was intoxicated, she would also agree that he knew the difference between right and wrong. One indication that Roman knew what he was doing was wrong is the fact that he didn't do the acts right out in the open (R 1299). She felt that Roman knew the "short-term" consequences of his acts but not the long-term, i.e., that the baby would "stay" dead. However, the American Psychiatric Association does not differentiate between short and long term consequences. Dr. Lekarczyk, herself, came up with this particular distinction (R 1301).

Dr. Lekarczyk diagnosed Roman as suffering from primary degenerative dementia, however, to diagnose primary degenerative dementia, one would have to exclude all other specific causes of dementia by history, physical examination and laboratory tests. Prior to making this diagnosis she did not have laboratory tests performed (R 1269;1272). She had actually diagnosed Roman as having moderate social impairment with inability to function occupationally and socially (R 1278).

She also acknowledged on cross-examination that Roman did not

have a total absence of the ability to understand or reason accurately but that the ability to understand or reason accurately was just impaired to some degree (R 1264). Dr. Lekarczyk also admitted that she would be in a better position to state what Roman's mental status was at the time of the crime if she had seen him prior to the offense (R 1291). She further acknowledged that mental health experts who had seen him prior to the crime and after the crime would be in a better position to evaluate his mental status at the time of the crime (R 1292).

Dawn Bowers is a clinical psychologist specializing in neuro-psychology, and evaluates persons with brain damage by performing batteries of tests to determine their cognizant ability (R 1311-1313). She administered the battery of tests to Roman and the findings were consistent with long-term alcohol abuse (R 1314). Based on the findings, the abuse was not severe and there was only mild or slight impairment which one would expect to find in any person who had used alcohol for a ten year period. Such description fits millions of Americans (R 1315-1317).

Dr. George W. Barnard examined Roman prior to the crime in 1973 and 1975, and found him legally and mentally competent on both occasions (R 1012-1013). He also examined Roman in this case (R 997). Dr. Barnard testified that there was no evidence to indicate that Roman suffered from schizophrenia, as there was no evidence of thought disorder, a hallmark of schizophrenia (R 1019). In his opinion, Roman did not meet the various criteria set forth by the American Psychiatric Association for the existence of schizophrenia, which would also hold true for March 13 and 14, 1981, at the time the crimes occurred (R 1024). In determining Roman's legal sanity at the time of the crimes he looked at Roman's confession statement, past medical records, actions of Roman prior to and at the time of the crime, and

his actions after the crime (R 1019). Based on the method in which the crime was committed and evidence of intentionality, it is Dr. Barnard's opinion that Roman knew the nature of his acts, the consequences of his acts, and the difference between right and wrong (R 1029). Barnard found purposeful and intentional activity on the part of Roman prior to and after the crime (R 1034). Even if Roman did suffer from alcohol abuse or dependence, he knew the nature and quality of his acts, and that what he did on March 14, 1981 was wrong (R 1074). If Roman was drunk at the time of the crime Dr. Barnard felt it would have lowered his capacity to reason (R 1055).

Based on examinations of Roman, his confession, and the testimony of witnesses, Dr. Frank Carrera testified that in his opinion Roman knew the nature and quality of his acts and the difference between right and wrong on March 14, 1981. It was also his opinion that Roman would have had the mental capacity to form premeditation or intent to kill (R 1083). Dr. Carrera further could not rule out that the symptomology Roman displayed during the period he was allegedly incompetent was the result of malingering (R 1113).

-XIV-

On March 10, 1983, the jury found Roman guilty of first degree premeditated murder, sexual battery of a person under the age of 11 years by a person over 18 years, and kidnapping (R 2467-2468). On March 11, 1983, a majority of the jury, by vote of 10 to 2, recommended that the court impose the death penalty (R 2478). The court found that the State had proved beyond a reasonable doubt in the penalty proceeding three aggravating circumstances as defined by Section 921.141, Florida Statutes, to-wit: "(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;" "(d) the capital felony was committed while the defendant was engaged in the commis-

sion of rape (sexual battery) and kidnapping;" and "(h) the capital felony was especially heinous (wicked, evil), atrocious, or cruel." (R 2492) The defendant proved the statutory mitigating circumstances as defined by Section 921.141, Florida Statutes, to-wit: "(f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." (R 2493) On March 18, 1983, Judge Booth ordered that Roman be electrocuted.

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS AND ADMITTED THEM INTO EVIDENCE AT TRIAL.

Roman moved to suppress statements given to Sumter County Sheriff's deputies at an interview prior to his arrest (R 1801-1821). The lower court denied the motion to suppress (R 2226). Roman renewed the objection at trial but the statements and a tape recording of them were admitted into evidence (R 840;853). Roman contends, in view of this, that his rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution were violated.

Roman first contends that the State failed to prove that he made a knowing and intelligent waiver of his rights.

The State would first dispute Roman's contention that he was "in custody" the evening he made the statements. According to the testimony of Sgt. Galvin and Sgt. Thompson, Roman came voluntarily to the interview in the investigator's room (R 2102). Sgt. Thompson, in fact, asked Roman if he would voluntarily come to the sheriff's department for an interview and Roman responded, "Yes, let's go ahead and get this mess over with so I can go to Eustis." (R 2102) Although Sheriff Adams testified that he did not intend for Roman to be free to leave the investigation room, the fact remains that Sgt. Galvin was the chief investigating officer and he testified Roman was free to go and he did not consider him to be in custody (R 2143). Sgt. Thompson also testified Roman was free to go, and in the event it became an issue he would have explained to Adams that he had no alternative but to let Roman go as there was no basis to charge him at that time (R 2132;2134). Sheriff Adams simply appears to have had a minimal role in the investigation

at that point in time and was not yet informed as to the status of the case by Thompson and Galvin, who were responsible for making decisions in the investigation prior to the time Roman was brought in (R 2031). There is no basis in the record to support the contention that Roman was not free to go.

Even though Roman was not deprived of his freedom in any significant way, triggering the need for warnings under Miranda v. Arizona, 384 U.S. 436, 82 S.Ct. 1602, 16 L.Ed.2d 694 (1966), in what was probably an abundance of precaution, such warnings were given, despite the fact that he was not in custody, on several separate occasions (R 2100-2101;2024;2104;2139).

The State would first note that the station-house setting of an interrogation does not automatically transform an otherwise noncustodial interrogation into a custodial interrogation. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). Nor does the mere fact that a defendant is taken into custody and questioned by peace officers render his confession inadmisssible on the ground that it was involuntarily given. Calloway v. State, 189 So.2d 617 (Fla. 1966). A confession may be obtained by questioning in the custody of an officer or in a jail and will be held admissible where there is no suggestion of intimidation, coercion, or the use of third-degree methods. Moffett v. State, 179 So.2d 408 (Fla. 2d DCA 1965).

It should be established at the outset that Roman's statement was intended to be blame-shifting and exculpatory and does not fit the standard description of a confession. A confession is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and is generally held to have no application to a statement that does not in effect or by a fair inference admit the commission of a crime Tucker v. State, 64 Fla. 518, 59 So. 941 (1912).

Contrary to appellant's assertion, the record adequately demonstrates

that Roman understood his Miranda rights and knowingly and intelligently waived them.

In determining the voluntariness of a confession, the court may take into consideration the mental condition of the accused. Williams v. State, 69 So.2d 766 (Fla. 1953). A confession elicited from a defendant who was under mental distress not induced by outside sources but which originates from the defendant's own apprehensions need not be suppressed State v. Caballero, 396 So.2d 1210 (Fla. 3d DCA 1981). The record supports the conclusion that any mental distress Roman may have been under originated from his own apprehensions. Roman did not appear intoxicated, understood where he was, who he was and what was going on about him, and gave responses that were normal, logical and reasonable (R 2104;2142;2028). Roman's trembling was consistent with any number of things, including being nervous about having committed a criminal offense (R 2094-2095). During the interview Roman was able to drink coffee and water (R 2143). Sheriff Adams believed that the cause of Roman's vomiting was that Roman figured "the world was fixing to cave in on him." (R 2095)

Dr. Barnard testified that Roman had the capacity to understand and knowingly waive his rights. See Statement of Facts section VII, page 10. Roman's intelligence merely falls into the lower end of average range (R 2067).

Roman did not actually refuse to sign the Miranda card, he simply informed the officers that "he had no rights" since he had been to Chattahoochee (R 2129). At the end of the taped interview Roman offered to sign the card several times (R 888). This response is not bizarre considering that he had been incompetent at one time and suffered the incidental loss of civil rights accompanying committment. In light of his other rational responses, this lone declaration may be susceptible to another interpretation

than that of "bizarre." (R 1534)

Aside from Dr. Barnard's testimony, Roman, himself, on several occasions acknowledged that he understood his rights (R 2100-2101;2023;2025; 2104;2140). Roman also is not a man with a mere passing acquaintance with Miranda warnings, in view of his long and extensive criminal history (R 2295-2392;1718-1720).

Roman's conduct at the station-house was cooperative and his acquiescence in accompanying the police was wholly voluntary. The conduct of police did not involve a show of authority and once there, Roman never expressed a desire to leave. Waiver can be inferred from the actions and words of the person interrogated North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Here Roman never invoked his right to remain silent or to counsel, as well as voluntarily remaining at the station-house once there.

Ware v. State, 307 So.2d 255 (Fla. 4th DCA 1975) cited by the appellant is inapposite, as the record does not show the use of a "family approach" by police, nor does Roman specify such instances. While the deputies admitted using the "christian burial" technique on Roman to soften him up, the record does not indicate that this approach was successful. On the contrary, Sheriff Adams testified that the use of the approach didn't encourage Roman to make statements and, in fact, Roman made no statements until shown a picture of the missing baby (R 2084;2088). While an abominable practice, it had no effect on Roman and did not induce the making of any statements. The court has also acknowledged that a confession shown to be voluntarily made by an accused while in custody is not rendered inadmissible because it appears to have been induced by a falsehood or deception Grant v. State, 171 So.2d 361 (Fla. 1965), cert. den. 384 U.S. 1014, 16 L.Ed.2d 1035, 86 S.Ct. 1933.

Roman also complains that the trial judge at the conclusion of the suppression hearing simply stated that the motion was denied (R 2226). While ideally a trial judge should specify his conclusions concerning voluntariness, due process is not offended when the issue of voluntariness is specifically before him and he determines that the statements are admissible without using the word "voluntary" Antone v. State, 382 So.2d 1205,1212 (Fla. 1980).

Roman next alleges that his statement should have been suppressed as fruits of an illegal arrest. This contention conveniently ignores the fact that Roman went voluntarily to the station-house upon being asked if he would come in for an interview (R 2102). There exists a distinction between an intrusion by police amounting to a "seizure" of the person and an encounter which intrudes upon no constitutionally protected interest. United States v. Mendenhall, 446 U.S. 40, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). Florida case law has not blurred that distinction and this court has not found an illegal detention without probable cause for an arrest where defendants have voluntarily agreed to be interviewed. See Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Smith v. State, 424 So.2d 726 (Fla. 1982). Here, the voluntary accompaniment by Roman to the station-house with the officers is buttressed by the fact that the record does not reflect any showing of force or authority on the part of the officers that might be construed as exerting compulsion on Roman to go with them.

Contrary to Roman's assertion that there is no direct evidence in the record of Roman's impression of his detention, Roman's own statement "let's get this mess over with so I can go to Eustis," indicates that Roman felt that there were some matters to be cleared up that would not result in incarceration

and that no restraints were then or would be placed on his freedom (R 2102). Also, at the conclusion of the interview, Roman stated that he was not mistreated and made an honest statement of his own free will (R 875).

It is obvious that Roman's actions in going to the station-house and participating in questioning were voluntarily undertaken. There is nothing in the federal or state constitution which would preclude an officer investigating a recent crime from going to the crime scene and asking nearby residents questions regarding the crime. When one of those present may seem somehow involved, it is certainly not unreasonable for an officer with no specific clues to attempt to interview that person though probable cause may not exist. That person may refuse to cooperate; however, if he or she does cooperate, the simple fact that the cooperation was requested by an officer of the law should not prevent use of its results where no coercion was used. To the State's knowledge, no Supreme Court decision has yet held that responses to an officer's requests are involuntarily made simply because the individual has not been told that he need not respond or cooperate or is free to leave. An added prophylactic in this case, however, is the fact that even though Roman went to the station-house voluntarily, he was advised of his Miranda warnings.

In the case sub judice the record does not show that Roman was treated as a suspect rather than a witness, and does not show that he was searched before travelling to the police station or guarded at the headquarters, nor is there any indication of pretextual arrest for the purpose of obtaining a confession.

Roman next contends that he was impermissibly denied his right to counsel prior to giving his confession.

In the case sub judice, Roman voluntarily accompanied Sgt. Thompson to the sheriff's department for an interview (R 2102). Roman admitted

he was treated well while at the sheriff's department and made an honest statement of his own free will (R 875). From the very beginning he was advised to remain silent. He was adequately advised as to all of his rights under the Miranda decision while in the patrol car and at the sheriff's department, and he was not prevented from securing counsel (R 2100-2101;2024;2104; 2139;2023).

If Roman felt that his welfare would best be served without an attorney, he certainly had the right to proceed with the statement in the absence of counsel. The Miranda decision does not require the interrogator to give legal advice, but only that a defendant be told his constitutional rights and make an intelligent waiver of counsel. The determination for need of counsel is the defendant's prerogative State v. Craig, 237 So.2d 737.740 (Fla. 1970).

The Miranda decision never contemplated that waiver of counsel could be accomplished only by the use of the words, "I am willing to answer questions without the services of a lawyer." A verbal acknowledgment of understanding and willingness to talk, followed by conduct which is consistent only with a waiver of his right to have a lawyer present, by one who has been advised of his rights, constitutes an effective waiver of his right to counsel at that stage of the proceeding. Craig, 237 So.2d at 741. There is no question in the case sub judice, that Roman understood his rights and exhibited a willingness to talk, which was never negated by a subsequent desire or request for the services of a lawyer (R 2100-2102;2028;2025;2104;2027;2105-2106;2144).

In State v. Craig, supra, the defendant voluntarily surrendered to a deputy who immediately advised him not to make any statements. At the jail he was orally warned of his rights to have an attorney and to remain silent

and that anything he said could be and would be used against him in court. In the meantime, the family of the defendant had secured counsel for him and had notified a deputy that the defendant had an attorney. Before his rights were explained to him the defendant was given an opportunity to make telephone calls and to communicate with any person outside the jail. The defendant refused to make any telephone calls and expressed no desire to communicate with anyone. The next morning an assistant state attorney came to the jail with a court reporter and investigator for the purpose of interrogating the defendant. The defendant again received Miranda warnings. The defendant responded "I will make a statement, but I ain't anxious to get no lawyer because I don't think it will help." As one basis for deciding that the transcript of the interrogation was properly admitted in evidence, this Court held that the defendant had waived the right to have counsel present at interrogation and that "the determination for need of counsel is the defendant's prerogative." 237 So.2d at 740.

In Davis v. State, 287 So.2d 309 (Fla. 2d DCA 1974) the father of a minor defendant retained an attorney for his son who was at the jail. The attorney subsequently went to the jail to see the boy but was denied admittance at least thirty minutes before the confession was made. The district court of appeal found that the boy was deprived of effective assistance of counsel. 287 So.2d at 400. However, this decision clearly turned on the fact that the defendant was a minor, only seventeen years of age. Under such circumstances it was reasonable for the father, who is responsible for the care of the son, to take the prerogative away from the son of determining the need for counsel and himself securing counsel as the protector and guardian of his child.

Clearly Craig remains unblemished and the law in Florida should

be interpreted to hold that the determination of the need for counsel is the prerogative of a competent defendant. Roman was never shown to be other than competent at the time he made the statement (R 2021;2100;2104;2142;2138;2056). Indeed, the opinion of Dr. Barnard was that there was no indication that Roman was intoxicated or mentally ill at the time he made the statement (R 2057).

Although Florida law is well-settled on this issue, Roman urges this Court to adopt a rule originated in People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), and further explicated in People v. Arthur, 22 N.Y.2d 324, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), and People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), sometimes referred to as the Donovan-Arthur-Hobson Rule. The rule holds that once the police know that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches and may not be waived in the absence of counsel. This rule extended the constitutional protections of a defendant under the New York Constitution beyond those afforded by the federal constitution and would do the same in Florida if adopted as the rule here.

Nothing in the Miranda opinion or in succeeding cases has indicated that the right to counsel may be asserted by anyone other than the accused State v. Burbine, 451 A.2d 22 (R.I. 1982). Not all courts have followed the New York approach. In a well reasoned analysis the Supreme Court of Rhode Island in State v. Burbine, supra, rejected such reasoning and held "We are of opinion that the principles of Miranda place the assertion of the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys." 451 A.2d at 28. (For a complete opinion in Burbine, upon which the State relies, the State refers this Court to the appendix of its answer brief which contains a report of the Burbine decision).

The State would strongly argue, moreover, that such a rule is inappropriate as there exists absolutely no rational nexis between a defense lawyer's appearance on the scene and a defendant's need or desire for a lawyer's help which is always available to him upon the simple dialing of a telephone number. "Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he springs to the telephone hardly seems a rational way of reconciling the interests of the accused with those of society." Y. Kamisar, Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When does it Matter? in Police Interrogation and Confessions 220 (1980).

The State would also strongly argue that this view is at odds with the opinion of the Supreme Court of the United States in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The Supreme Court has never held that the decision to waive the right to counsel should be a jointly reasoned decision between the accused and his attorney. The Court stated in Brewer:

> . . .The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not.

430 U.S. at 405-406,97 S.Ct. at 1243, 51 L.Ed.2d at 441. (emphasis added)

Logic dictates that if a defendant can waive the right to counsel without notice to counsel (that he has specifically retained and is aware of), he can certainly waive the right to counsel without notice to an attorney who purports to act on behalf of the accused, that the accused does not even have knowledge of.

The evidence is overwhelming that Roman was admonished of the

right to remain silent and of his right to retained or appointed counsel. "It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." State v. Burbine, 451 A.2d 22,29 (R.I. 1982).

"Is society so orderly, is crime so well under control, that we can indulge ourselves in the luxury of reversing convictions on grounds not touching the question of guilt or innocence or the voluntariness of a defendant's statements?" People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628,634 (N.Y. 1963) (dissent). "The perpetrator of a crime is normally the one who knows most about it and his confession, voluntarily made is often the best evidence of his guilt that can be obtained." Donovan, 193 N.E.2d at 632 quoting Justice Trayonr in People v. Garner, 367 P.2d 680,696. "To permit a suspect in cases such as the present, to confer with an attorney before talking to the police would preclude effective police interrogation and would in many instances impair their ability to solve difficult cases." Donovan, 193 N.E.2d at 630.

The State would submit that the results of adopting such a rule would be disastrous. Such consequences were pointed out in State v. Burbine, supra:

> . . .We fear that if such a rule were adopted, there would be nothing to prevent or discourage the office of the public defender or other defense counsel who represent a large number of recidivistic clients from sending to the various police departments throughout the state the names of these clients, together with a request that these attorneys be notified in the event that such individuals are arrested for criminal conduct. Under such a rule, the failure of the police, whether by administrative inadequacy or otherwise, to effectuate such a notification would

> then be fatal to the admissibility of any statements thereafter obtained. As the crime rate increases and as organized society seems ever more impotent to deal with crime on our streets, in our neighborhoods, and in our homes, this addition to the Miranda requirements seems as unwise on policy grounds as it is unnecessary on constitutional grounds. Thus far, the Supreme Court of the United States has placed no such mandate upon us.

451 A.2d at 30.

It was further suggested in Burbine that "the next logical step would be to ban confessions altogether on the theory that a person should not be denied his right to counsel on the fortuitous circumstance that someone might not see fit to call the station." 451 A.2d at 30.

Before reaching the issue of waiver, however, a threshold determination must be made whether an attorney-client relationship existed between Roman and Mr. Coniglio. Although Attorney Coniglio purportedly called the sheriff's department and advised them he'd been retained by the family and asked them not to question Roman, the record shows that at that point Coniglio had not even decided whether he would take the case (R 2150). His testimony conclusively shows the lack of an attorney-client relationship. (See section X, appellee's Statement of Facts).

II. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR MISTRIAL ON THE BASIS OF WITNESS DOUGLAS CALVERT'S TESTIMONY.

At the trial below, the State called Douglas Calvert as a rebuttal witness. Thereafter, it asked Calvert the following question:

> Q. Did you have occasion to overhear what, if anything, Mildred Beaudoin said in that telephone conversation?

(R 1372).

The answer given by witness Calvert is in dispute and was the topic for a mistrial motion by the defense. The court reporter's notes spelled out the first three letters of a word defense counsel claims was actually "another." The court reporter's notes indicated that the answer to the question was the following:

> A. Yes. She said that "Ernest had killed 'ano' killed a baby I reckon."

(R 1372)

Defense counsel Harrison advised the court that he clearly heard the word another (R 1374). The State argued that the witness never got the word out and that the prosecutor's recollection in listening to the answer was that witness Calvert had stated "she said Ernie has killed an uh killed a baby I reckon." (R 1374) The State also argued:

> . . .It would seem, to someone listening to it who does not know the things that we know, that is, that the first statement was "killed another baby" back when his deposition was taken. The jury does not know that. And, since they don't know that they probably would have heard him say "an uh" as though it were "an baby", and he said "uh" in between the "an" and "baby", and then changed it to "a". So, I would submit that the only thing the jury would get out of that is

> that he changed it from "an baby" to
> "a baby".

(R 1375)

The trial court denied the motion for mistrial stating as follows:

> . . .I think that had the jury heard the testimony during the deposition, that was given at the deposition, that there might be a reason for them to take that he was saying "another child", but with the speech or the language that was used, I don't think that they would take it to be anything than he had "killed a uh, ah a baby", kind of a stammer. Natural stammer, that a witness would possibly, because of the nature of the thing, might just stammer before saying it. I don't think that it would give the connotation to the jury that he was saying "another child".

(R 1376)

The State would argue that a playing of the tape, which has been made a part of the record, and the listening thereto by someone unfamilar with the arguments advanced on appeal would not result in an interpretation of the disputed word as that of "another." (R 2641) During the State's case in chief, defense counsel had previously objected to the testimony of Calvert that he had overheard Mildred Beaudoin state on the telephone that "Ernie has killed a baby, I reckon." The court overruled the objection on the basis that Beaudoin's statement was an excited utterance, an exception to the hearsay rule under Section 90.803(02), Florida Statutes (1981). It is well settled that even if the declarant is available as a witness, a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible as hearsay, Florida Statutes, Section 90.803(2). This code provision is in accord with prior decisions, which held such statements admissible when they

were produced by circumstances causing excitement which temporarily prevented reflection and produced an utterance free of fabrication Foster v. Thornton, 125 Fla. 699, 170 So. 459 (1936). In the case sub judice, Beaudoin's excited utterance occurred after an ambulance had gone up the hill to pick up the body of Tasha Marie Smith, at which point she collapsed and fell down and was assisted into her trailer by Douglas Calvert. She immediately made a phone call in which she made the statement in issue, that "Ernest had killed a baby, I reckon" (R 371-372). Clearly the startling event in the case sub judice was Beaudoin's witnessing of the ambulance, which led to the telephone call and the statement.

In a similar case, Conner v. State, 356 So.2d 336 (Fla. 4th DCA 1978) a statement made by the defendant's son while both were engaged in a fight and shortly before the defendant pulled out a gun and shot two men, "You better watchout, my dad is a killer," was properly admissible under the excited utterance theory. It was not held inadmissible despite its possibly prejudicial effect.

Aside from whether or not this Court finds such a spontaneous or excited utterance to be admissible, Roman contends that the real issue is that of prejudice to the appellant, since even were such a statement admissible, its probative value would be outweighed by prejudice. The State would strongly argue that in light of the evidence in the case sub judice, the prejudice, if any, in admitting such testimony was non-existent. In the case sub judice there was not only sufficient testimony, but sufficient evidence from which a jury could find that it was Roman who committed the offense. Although, in a capital case, this Court will carefully scrutinize any error before determining it to be harmless, it will not presume that there was prejudice Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. den. 444 U.S.

885, 100 S.Ct. 177, 62 L.Ed.2d 1115 (1975). In determining whether an erroneous ruling below caused harm to the substantial rights of the defendant, an appellate court considers all the relevant circumstances, including any curative ruling or event and the general weight and quality of the evidence. In other words, the court inquires generally whether, but for the erroneous ruling, it is likely that the result below would have been different. See Palmes v. State, 397 So.2d 648 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 369 (1981); Campbell v. State, 227 So.2d 873 (Fla. 1969), cert. dismissed, 401 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970). In the case sub judice, it is not likely that the result below would have been different had the court made a different ruling. As more fully addressed in point III, Roman claimed to have spoken to Mildred Beaudoin the morning after the crime, a fact which Beaudoin denied, and claims no knowledge of the circumstances of the crime despite the fact that she knew of all those present that evening, Roman was the only one with access to the child and despite her subsequent act of breaking down upon seeing the ambulance and stating on the telephone "Ernest has killed a baby, I reckon." Her subsequent acts, apart from being spontaneous and free of fabrication, were relevant to show that Beaudoin did have knowledge that Roman played a part in the crime and belie her contention that she had not spoken to Roman about the incident.

Alternatively, the State would argue that even if the admission of such testimony was error, that Mildred Beaudoin was not an unavailable declarant and her testimony for the defense would clearly show a lack of knowledge in regard to Roman's guilt or innocence, and moreover, on cross-examination Beaudoin testified that she did not remember what she said on the phone because she was too upset and hysterical (R 1160-1161). Clearly, if there was error, as the appellant condends, due to the lack of personal

knowledge on the part of Mildred Beaudoin as to whether Roman had in fact killed a baby, such error could not have tainted the jury's decision as it was obvious from Beaudoin's testimony that she had not witnessed the crime nor had any reason, other than her hysterical state, to believe that the crime was committed by Roman. The State would strongly argue that the result below would not have been different had the testimony not been admitted, due to the general weight and quality of the evidence against Roman. This is obvious from the statement of the facts contained in this brief and is more fully argued in other points. Even constitutional error may be treated as harmless where the evidence of guilt is overwhelming Jones v. State, 332 So.2d 615,619 (Fla. 1976). For reasons addressed more fully on other points in this brief, the State would argue that in the case sub judice the evidence of guilt was overwhelming.

The State would also reiterate its prior contention that a playing of the tape of the testimony of Douglas Calvert, which is included within this record on appeal, conclusively shows that the word "another" was not heard by the jury; nor could the sounds that were heard by the jury be construed by the jury to mean the word "another." Even in the event that this Court cannot so conclude upon listening to the tape, the State would also point out that one cannot know how the jury construed his answer, or what weight was given to it: therefore, to assert that it was construed as meaning that Mildred Beaudoin had knowledge that Roman had killed another baby would be pure speculation. Reversible error cannot be predicated on conjecture Singer v. State, 109 So.2d 7 (Fla. 1959); Sullivan v. State, 303 So.2d 632 (Fla. 1974). Further, as the appellant admits, such testimony was not provoked by the State.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED THE DEFENDANT'S SISTER IF THE DEFENDANT HAD TALKED TO HER THE MORNING BEFORE HE WAS ARRESTED, AS SUCH QUESTION DID NOT DIRECTLY INFER THAT THE APPELLANT HAD CONFESSED TO HIS SISTER.

Roman called his sister, Mildred Beaudoin, as his first witness. On cross-examination of Beaudoin the prosecutor asked:

> Q. Isn't it a fact that you talked to your brother, the morning before he was arrested, and he told you what happened?
>
> A. No, sir.

(R 1160-1161)

A mistrial should only be granted when such fundamental or prejudicial error has been committed as will require the granting of a new trial later. In most cases the prejudicial error will be cured by asking the judge for a curative instruction to the jury that they disregard the objectionable matters. Where improper questions are asked of a witness in the presence of the jury, the defendant should request the court to instruct the jury to disregard the objectionable remarks Sykes v. State, 329 So.2d 356 (Fla. 1st DCA 1976); Perry v. State, 146 Fla. 187, 200 So. 525 (1941). In the case sub judice, the appellant did not request the trial court to instruct the jury to disregard the objectionable remark (R 1161). In essence, the trial court was not given the opportunity to cure any possible prejudicial error through curative instructions to the jury that they disregard the objectionable matters. The State would submit that this is not a case where such prejudicial error occurred that could not be cured by an instruction and would require the granting of a new trial later. If there was error, counsel for Roman could have minimized the impact of said error on the jury by requesting curative instructions of the trial court.

Roman contends now, on appeal, that the above question was a highly improper intimation of a non-existent confession and was so prejudicial as to deny Roman a fair trial. Counsel for Roman, however, did not advance the theory of an "intimation of a non-existent confession" in the trial court below, but merely represented that unless the State could prove that Beaudoin had talked to her brother the morning before he was arrested, and that her brother told her what had happened, the defense would move for a mistrial (R 1161). There was no indication below that the State was conjuring up a "phantom confession." It is well-settled, that an argument cannot be advanced for the first time on appeal. Moreover, Roman seeks to advance this theory of a "phantom confession" by tying it in with a prior case, Huff v. State, ___ So.2d ___, [8 FLW 325] (Fla. 1983), in which the same prosecutor predicated part of his closing argument on an issue for which no evidence had been introduced during the trial. The State would submit that the law is not so vengeful that upon the commission of one error, an officer of the court is relegated to the realm of suspicion and innuendo, and prior errors can be imputed and connected with actions in subsequent cases. Roman's case is no less weaker upon his instant replay of past follies of the State. Roman errs in contending that the prosecutor has committed the same reversible error by stating that a confession had been made when there were no facts in evidence to justify this conclusion.

The fact remains, that no one other than Roman has construed the above question as implying that Roman made a confession in telling his sister what happened. Roman's own taped statement indicates that he did indeed speak to his sister after the sheriff had arrived (R 857). The fact that Roman may have told his version of what happened does not in the least imply that he admitted his guilt to his sister, or that he confessed to his sister, especially in view of the later statement he gave to the police in which he claimed that

the crime was committed by an older man. In this "phantom confession" now advanced on appeal, Roman does not indicate why we should believe that he was more truthful to his sister than he was to the police. One cannot know how the jury construed this question and answer or what weight was given to it: therefore, to assert that it was construed as meaning that Roman had acknowledged his guilt to his sister, Mildred Beaudoin, would be pure speculation. Reversible error cannot be predicated on conjecture Singer v. State, 109 So. 2d 7 (Fla. 1959); Sullivan v. State, 303 So.2d 632 (Fla. 1974).

This case can be distinguished from Huff, supra. In Huff, the State conceded that the remarks were improper and foolish, however the State will not so readily concede error in the case sub judice. In Huff the matter was clearly not in evidence, however, in this case Roman's own statement showed that he had, in fact, talked to Mildred Beaudoin that morning. Beaudoin's testimony on direct examination did not reflect any knowledge of the circumstances of the crime other than Roman having been with her until 1 o'clock that evening when she put him out of her trailer (R 1134-1135). However, the fact remains, that when Beaudoin viewed the ambulance driving up the hill to pick up the body of Tasha Marie Smith, she collapsed, then went inside her trailer and stated on the telephone that "Ernest has killed a baby, I reckon'." Beaudoin's actions prove that she knew Roman played some part in the crime, a fact Roman's own statement reflects--a fact the evidence overwhelmingly shows. The facts point to Beaudoin knowing that Roman was involved in the crime despite her denial. What she suspected was proven to the jury beyond doubt. Beaudoin had every reason to believe Roman played a part in the murder, as of all the people present on that evening only Roman had access to the child. Her actions in collapsing and excitedly uttering the statement that "Ernest has killed a baby," were so spontaneous as to preclude fabrication

and reflected not only what Roman may have informed her of in regard to the crime, but also her own personal knowledge of the fact that Roman was the only individual present that evening who could have been linked to the disappearance of the child. It cannot be said that Mildred Beaudoin was without knowledge of the facts of the crime.

For reasons more fully discussed in the argument section of point VI of this brief, the evidence of guilt was overwhelming in the case sub judice. No purpose would be served by the retrying of Roman, as no different result could possibly be reached by a new tribunal. The State would submit that it is the most imperfect criminal who demands the most perfect tribunal. There was no tribunal at all, however, on the evening Tasha Marie Smith was buried alive. Dastardly crimes precipitate drastic measures. In the case sub judice even the defense attorney broke down and cried (R 1446). Those who perform the most heinous acts cannot expect to be tried by super-objective automatons. While it is clear that we must hold ourselves to the highest possible standards, a clear warning must echo through the criminal community that they can only expect to be tried by human beings, and upon commission of atrocious crimes, will be entitled only to as fair a trial as possible, not a perfect trial. See Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

Here, Beaudoin knew that Roman had left the trailer before the others and was the only person who could be linked to the disappearance of the child. According to Roman, she spoke with him after the sheriff had arrived the next day. Beaudoin, however, denied this. Had Roman not intimated to her in some way that he was involved in the crime, Beaudoin would have had no substantial basis for making the statement on the telephone, other than the fact that Roman was the only one who had access to the child. Her subsequent statement

on the telephone reflects the very fact that she did possess knowledge that she denied having. Moreover, the knowledge she denied having was subsequently proven beyond a reasonable doubt to the jury, i.e., that Roman was guilty; whether her actions and statements were founded on personal knowledge or suspicion as Roman contends, the fact remains that with or without her testimony, the jury would have reached the same result.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE APPELLANT'S MOTION FOR A MISTRIAL WHEN THE PROSECUTOR ASKED A DEPUTY SHERIFF IF HE HAD OCCASION TO LOOK AT THE APELLANT'S RECORDS.

In the course of questioning Deputy Sheriff Galvin, the prosecutor asked the following question:

> Q. In the course of the investigation, once you focused upon the defendant, Ernest Roman, as the person who had committed these crimes, did you have occasion to look at his records in the Sumter County Sheriff's department? (R 878)

Rather than phrasing an immediate objection, the defense, instead, merely requested of the court that it be allowed to approach the bench (R 878). For lack of an appropriate objection, the officer went ahead and answered the question, stating: "Yes, I did." (R 878) The rule requiring a contemporaneous objection at trial under such circumstances is firmly established. Roman's argument should not be considered on appeal unless the admission of the evidence constituted fundamental error Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980). Had a timely objection been made, the deputy, who like most officers of the law probably has more than a passing acquaintance with the workings of the trial court, would probably not have responded affirmatively to the question, thereby allowing the jury to be informed that there were records on Roman in the Sumter County Sheriff's Department. By asking to merely approach the bench rather than strenously objecting, defense counsel turned a "possibility" that there were records on Roman in the sheriff's department into a foregone conclusion. In this respect, whatever harm which may have been caused by the propounding of the question was not enhanced, but stabilized, by the appellant's own inaction. However, neither the question

nor the answer were worthy of the application of the extreme remedy of declaring a mistrial.

Florida case law clearly states that a motion for declaration of a mistrial is addressed to the sound discretion of the trial judge Salvatore v. State, 366 So.2d 745 (Fla. 1978); Strawn v. State ex rel. Anderburg, 332 So.2d 601 (Fla. 1976); Paramore v. State, 229 So.2d 855 (Fla. 1969); modified on other grounds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). In this state the rule has long been established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution, and should be done only in cases of absolute necessity Salvatore v. State, supra. The State would submit that in the case sub judice there was no absolute necessity to declare a mistrial.

Pursuant to the propounded question and subsequent answer in the case sub judice, the only fact before the jury was that the Sumter County Sheriff's department had records on Roman. It was not established that those records were "criminal" records. It is a well known fact that law enforcement agents have detailed records of many persons for investigative purposes and for many other purposes unrelated to direct criminal activity. The testimony in no way established a prior criminal history, and is much less egregious than other testimony that has been ruled to not warrant the declaration of mistrial by this and other courts in this state.

For instance, in Straight v. State, 397 So.2d 903 (Fla. 1981) actual criminal activity was inferred. The assistant state attorney asked the question calculated to elicit irrelevant testimony and suggesting to the jury the existence of prejudicial evidence. The question propounded to the appellant suggested unrelated criminal activity and was as follows: "Isn't it true that it was Dr. Day that you were going to use the pistol on that

Jane bought you?" This Court held that:

> . . .That the assistant state attorney's question, calculated to elicit irrelevant testimony and suggesting to the jury the existence of such prejudicial evidence, was highly improper, is without question. We do not believe, however, that the improper comment, by itself, was sufficient to require that the court grant the motion for a mistrial.

397 So.2d at 909.

The testimony in this case did not rise to the level of egregiousness as that in Straight, supra, as it did not refer to any specific or prior criminal record or activity.

In Wilson v. State, 436 So.2d 908 (Fla. 1983), this Court seemed to devise a test of "intentionality" in regard to the granting of a mistrial on the basis of testimony that implies a prior criminal record. In Wilson, supra, the prosecutor asked what charges the appellant was arrested for "in connection with this case." The appellant objected and moved for mistrial, which was denied. This Court held:

> . . .The record does not disclose that the prosecutor intentionally tried to create an impression in front of the jury of appellant's arrest for other crimes; in fact, the record bespeaks that the prosecutor tried his best to make sure that this information was not revealed to the jury. We thus can find no error in the trial court's denial of the mistrial motion.

436 So.2d at 912 (emphasis added).

Similarly, in the case sub judice, there is no evidence that the prosecutor intentionally tried to create an impression in front of the jury of Roman's arrest for other crimes. The prosecutor did not seek to bring out prior convictions or arrests, or even specific instances of criminal conduct

but merely sought to establish a pattern of malingering on the part of Roman at those times he came in contact with the law (R 879). Roman's own exculpatory statement, in which he claims not to have molested and killed the child but merely observed another in those acts, contains a profession of the need for mental health treatment, which is certainly some evidence of malingering, considering that Roman had sufficient mental capacity at the time of making the statement to blame another for the crime, still leaving the possibility that any untoward acts found to be performed by him were the result of mental disturbance. Moreover, Dr. Carrera, appointed by the court to examine Roman to determine whether he was sane at the time of the crime, testified that he could not rule out that the symptomology Roman displayed during the period he was allegedly incompetent was the result of malingering (R 1113). The burden being on the State to prove sanity beyond a reasonable doubt, and Roman having put his sanity in issue not only at trial but as early as his taped confession, the State would submit that there would be some unfairness in not allowing the State to show Roman's established pattern of becoming mentally ill upon encounters with the law. The fact that the onset of malingering may have occurred upon contact with law enforcement agents is at the choosing of the appellant not the State. In light of Roman's self-proclaimed need for psychiatric treatment, the State would submit that the prosecutor acted in a good faith belief that such a claim should be rebutted by a history of malingering and he did not intentionally introduce evidence of criminality. (See R2295-2392).

Moreover, the testimony established only that in the course of the investigation, records were examined after the investigation became focused upon Roman (R 878). The jury could just as reasonably conclude that the records the deputy examined were pursuant to this particular investigation and not prior records. The officer's bare statement that he had looked at

Roman's records, to the extent that such statement arguably could be said to carry any inference of prior criminal conduct on the part of Roman, the error was harmless. See Clark v. State, 378 So.2d 1315 (Fla. 3d DCA 1980).

The facts of the case sub judice, moreover, can be analogized to that of testimony in regard to mug shots, in which cases police officers often testified that they investigate other cases and put together a photographic line-up from which the victim may identify the defendant. Although such testimony has been claimed to imply a criminal background, and has been the basis for many motions for mistrial, it has not provided a basis for reversal of conviction Evans v. State, 422 So.2d 60 (Fla. 3d DCA 1982); Moore v. State, 418 So.2d 435 (Fla. 3d DCA 1982); Willis v. State, 208 So.2d 458 (Fla. 1st DCA 1968). Similarly, in the case sub judice, while such testimony should not be deliberately elicited, it does not warrant the drastic remedy of mistrial.

It is well settled that where evidence of guilt is overwhelming, even a constitutional error may be rendered harmless Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). In the case sub judice the evidence of guilt was overwhelming. As the statement of the facts will show, Roman's own exculpatory statement placed him at the scene of the crime, while the testimony of other witnesses indicated that no one other than Roman had access to the child at the time of the crime. Moreover, the facts related by Roman, especially his account of throwing a refrigerator pan over the child while she was buried alive, was consistent with the examining physician's conclusion that the mark on her head could have occurred while she was being held down in her sandy grave by an appliance such as a refrigerator pan. There was more than sufficient physical evidence to link Roman with the sexual battery

of the child and her subsequent burial in the sand while still alive. Most damaging was Roman's detailed description of how an older man allegedly performed the acts while Roman merely observed, where such detailed account proved consistent with the manner in which the child actually died, and the man Roman accused of the actual murder was eliminated as a suspect by the police.

A similar case was Ferguson v. State, 417 So.2d 639 (Fla. 1982). In Ferguson a witness indicated that he and another individual had been in prison with the defendant. The defendant contended that a prior imprisonment was irrelevant to his guilt or innocence, and the only result would be to show the defendant's bad character. At trial the appellant made a general objection which was overruled and a motion for mistrial was denied. This Court stated:

> . . .Initially, we reiterate our emphasis on the importance of stating specific grounds for objections and motions for mistrials. Also, especially in an instance such as this, a curative instruction should be requested. The defendant now contends that a prior imprisonment was irrelevant to his guilt or innocence in this case; the only result would be to show the defendant's "bad character." Such remarks may be erroneously admitted yet not be so prejudicial as to require reversal Darden v. State, 329 So.2d 287 (Fla. 1976), cert. denied, 429 U.S. 1036, 97 S.Ct. 729, 50 L.Ed.2d 747 (1977); Thomas v. State, 326 So.2d 413 (Fla. 1975). In Smith v. State, 365 So.2d 405 (Fla. 3d DCA 1978), the court noted that any prejudice arising from the admission of testimony indicating a defendant's prior incarceration could have been corrected by an instruction to the jury to disregard the testimony. The court held that in the absence of a defense request for such an instruction, the trial court properly denied the motion for mistrial. Our review of this record persuades us that the admission of Archie's testimony in this matter was not so prejudicial as to

warrant a reversal.

417 So.2d at 642.

V. THE COURT DID NOT COMMIT ERROR BY NOT INSTRUCTING THE JURY THAT THE STATE HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE COMMISSION OF THE CRIMES.

Roman submits that he adduced sufficient evidence at trial to raise a reasonable doubt about his sanity, although he does not specifically set forth in his argument what that sufficient evidence was. He further contends that once he introduced evidence causing the jury to have a reasonable doubt about his sanity, the State was required to prove beyond a reasonable doubt that he was legally sane at the time of the commission of the crimes. He further contends, therefore, that the jury instruction given in the case sub judice does not address the subject of the burden of proof and is defective because it does not squarely place the burden of proof on the State to prove sanity beyond a reasonable doubt in view of his contention that he had adduced evidence to raise a reasonable doubt about his sanity.

The burden of proving insanity is on the defendant because he is presumed sane under the law. When he rebuts the presumption of sanity by presenting evidence of insanity sufficient to raise a reasonable doubt, the burden shifts to the State to prove sanity beyond a reasonable doubt. Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980); Parkin v. State, 238 So.2d 817 (Fla. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1189, 28 L.Ed.2d 322 (1971); Farrell v. State, 101 So.2d 130 (Fla. 1958). Reasonable doubt is a jury question Byrd v. State, 297 So.2d 22 (Fla. 1974).

Although it is clear that Florida law requires the prosecution to prove sanity beyond a reasonable doubt, since insanity involves the mens rea or intent, which is usually an element of the offense which the State must

prove, this may not be necessary nor no longer wholly accurate. As to the issue of insanity in a criminal case, the State would suggest that it would not be unconstitutional to impose the burden of persuasion on the defendant rather than, as is now the rule, on the prosecution. The United States Supreme Court's explicit reaffirmation of Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002 (1952), permitting placement on the defendant of the burden of persuasion as to his or her insanity--especially after its decision in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), requiring the State to prove all elements of the offense beyond a reasonable doubt-- would appear to indicate that a state statute placing the burden of persuasion as to insanity on the defendant is not of itself constitutionally defective. In light of this, there would seem to be no constitutional mandate requiring an instruction that the State must prove sanity beyond a reasonable doubt as the burden of persuasion could just as easily be placed upon the defendant as on the State. Moreover, it is well settled that where the court charges the jury that the defendant is entitled to the benefit of every reasonable doubt of his guilt, it is not necessary to repeat the caution with each special instruction given Sylvester v. State, 46 Fla. 166, 35 So. 142 (1903). In the case sub judice the jury was clearly informed that the presumption of innocence stays with the defendant until overcome by evidence to the exclusion of and beyond a reasonable doubt. The court instructed the jury as follows:

> The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. (R 1496)

Clearly, the jury was informed that the burden upon the State was to prove Roman's guilt beyond a reasonable doubt and it was not necessary to reiterate such burden upon the simple adducement of some evidence of insanity.

The insanity instruction given the jury was taken almost verbatim from Section 3.04(b), Insanity, of the Florida Standard Jury Instructions for Criminal Cases, which have been adopted by this Court. The instruction given the jury is set out as follows:

> . . .An issue in this case is whether the defendant was legally insane when the crimes allegedly were committed. You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity. If the defendant was legally insane, he is not guilty. To find him legally insane, these three elements must be shown to the point you have a reasonable doubt about his sanity. . .
>
> [The elements are then enumerated.]
>
> If there is evidence that the defendant was legally insane at some time before the commission of the alleged crimes, you should assume the defendant continued to be insane at the time of the commission of the alleged crimes unless the evidence convinces you otherwise.
>
> . . .Legal insanity can result from voluntary intoxication when through excessive and long continued use of intoxicants a condition of insanity, permanent or intermittent, is produced, and this condition existed at the time of the unlawful act. Again, if the defendant was legally insane, he is not guilty of the three crimes against him. (R 1500-1502)

Roman contends that he introduced evidence causing the jury to have a reasonable doubt about his sanity and the State was required to prove beyond a reasonable doubt that he was legally sane at the time of the commission of the alleged offenses. Roman complains, however, that the instruction

is defective because it does not squarely place the burden of proof on the State as is required. The State would argue, however, that the instruction is couched in terms more favorable to Roman than would be the instruction Roman now contends is mandated. Under the above instruction Roman was presumed sane unless the evidence caused the jury to have a reasonable doubt about his sanity, in which case Roman is not guilty. The court then enumerated the elements that would cause a reasonable doubt about his sanity. Under the above instruction, the jury could reasonably conclude that the reasonable doubt of Roman's sanity was conclusive, unrebuttable, and established that Roman was ipso facto legally insane, as the jury was not informed that the reasonable doubt could be dispelled by the State by showing sanity beyond a reasonable doubt. The jury in essence, was totally unaware that the State could rebut the alleged reasonable doubt of sanity. Since it was not even aware that the reasonable doubt of sanity could be rebutted, Roman certainly couldn't have been harmed by the Court's not instructing the jury that such rebutting evidence must prove sanity beyond a reasonable doubt, since under this instruction insanity would seem to be conclusive upon the showing of the enumerated elements. If anything, this instruction served to ease Roman's own burden of proof. Moreover, the defense advanced a theory of chronic alcoholism and intoxication at the time of the crime in support of their quest for a finding of legal insanity and the above instructions in regard to continued use of intoxicants and severe intoxication were more than adequate to allow the jury to make a determination of insanity if it were so warranted, under the facts of the instant case.

The record reflects that Roman's own requested insanity instruction contains no language which would inform the jury that once they had a reasonable doubt about Roman's sanity the State was required to prove beyond a reasonable doubt that Roman was legally sane at the time of the commission of the offense.

(R 2428). Roman's requested instruction would make a reasonable doubt about Roman's insanity at the time of the crimes conclusive, warranting a verdict of not guilty because of insanity without allowing the State to prove beyond a reasonable doubt that he was legally sane. In this regard Roman's requested instruction is similar to the actual instruction given by the court below. It is obvious that Roman never requested of the trial court the jury instruction that he now requests on appeal. The absolute necessity for an instruction being requested cannot be overemphasized because there will be no fundamental error in the absence of a request Williams v. State, 346 So.2d 554 (Fla. 1st DCA 1977), cert. denied, 353 So.2d 681. Failure to give an instruction is of no avail on appeal unless it is requested and is improperly refused at the trial level Brown v. State, 206 So.2d 377 (Fla. 1968). Further, Florida Rule of Criminal Procedure 3.390(d) states that no party may assign as error the giving or the failure to give an instruction unless he objects to it before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Objection by the defendant to instructions given by the court or the refusal of the court to include instructions requested by the defendant are prerequisites to appealable error. In the case sub judice counsel for Roman, at the conclusion of the closing arguments, reiterated objections previously made in a charge conference which included an objection to the insanity instruction on the issue of burden of proof (R 1507). However, the objection made below does not seem to be on the same basis as the issue now advanced on appeal. At the recorded charge conference, counsel for Roman stated that he would request a specific written instruction on insanity, as the standard one shifts the burden of proof (R 1410-1411). Defense further stated that it had a written instruction that would delete "that insanity is presumed" and that the objection to the State's instruction on sanity is on the burden of proof issue

(R 1412). Roman's requested instruction shows that he would delete language indicating that the jury must assume that Roman was sane unless the evidence caused them to have a reasonable doubt about his sanity (R 2428). In view of the record, it would appear that the issue of burden of proof advanced on appeal is not the same issue presented to the trial court below. Therefore, not only was the instruction not requested, but objections made below to the instruction given were not on the same grounds as now advanced on appeal. The State would conclude that the error has not properly been preserved for appeal.

The State would further submit that Roman did not adduce sufficient evidence to cause a reasonable doubt as to his sanity in the first instance. As pointed out in section II of the statement of facts, the majority of the witnesses who testified at trial believed Roman to be sober and not drunk on the evening of the murder. Court-appointed expert Dr. Barnard concluded that had Roman not been under the influence of alcohol and drugs at the time of the crime he would have been legally sane, knowing the nature, quality, and consequences of his actions and the difference between right and wrong (R 1920-1922). Defense expert Dr. Dorothy Lekarczyk testified that Roman would clearly have been sane had he been sober at the time of the murder and would have known the difference between right and wrong and had the capacity to formulate premeditation (R 1304-1305; 1311). Dr. Frank Carrera testified that, in his opinion, Roman knew the nature and quality of his acts and the difference between right and wrong on the evening of the crime. It was also his opinion that Roman would have had the mental capacity to form premeditation or to kill and Dr. Carrera further could rule out that the symptomology Roman displayed during the period he was allegedly incompetent was the result of malingering (R 1083;1113). Dr. Barnard further testified at trial that there was no evidence to indicate that Roman suffered from schizophrenia as there

was no evidence of thought disorder (R 1019). Based on the method in which the crime was committed and evidence of intentionality, it was Dr. Barnard's opinion that Roman knew the nature of his acts, the consequences of his acts, and the difference between right and wrong. Barnard found purposeful and intentional activity on the part of Roman prior to and after the crime. Even if Roman did suffer from alcohol abuse or dependence, he knew the nature and quality of his acts and that what he did was wrong (R 1029;1034;1074). Dawn Bowers, a clinical psychologist specializing in neuropsychology, determined that Roman suffered only a slight impairment, which millions of other Americans suffer, which one would expect to find in any person who had used alcohol for a ten year period (R 1315-1317). Although defense expert Lekarczyk claimed that Roman suffered from schizophrenia and alternatively claimed he suffered from primary degenerative dementia, without making laboratory tests, her actual diagnosis of Roman was that he had moderate social impairment with inability to function occupationally and socially (R 1260;1269;1272;1278). This impairment hardly rises to the level of insanity nor is it some evidence of insanity. The State would conclude in view of such testimony that Roman did not even adduce any evidence of insanity and it was, therefore, unnecessary to instruct the jury that evidence of insanity having been adduced, it was then the State's burden to prove sanity beyond a reasonable doubt. Also, in view of the overwhelming evidence that Roman was, indeed, sane at the time of the commission of the crime, even in the event that some miniscule evidence as to insanity had been adduced, the error, if any, in not instructing the jury as to the State's burden of proving sanity beyond a reasonable doubt could only be harmless. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

VI. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S REQUESTED MITIGATING CIRCUMSTANCE INSTRUCTION DURING THE PENALTY PHASE AND PROPERLY SENTENCED THE DEFENDANT TO DEATH.

At the conclusion of the penalty phase of the trial, counsel for Roman requested that the trial court instruct the jury as to the statutory mitigating circumstance set forth in Florida Statutes Section 921.141(6)(b), which states, "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." (R 1578) The trial court denied the requested instruction and Roman contends this ruling was in error (R 1580).

The State properly argued below that there had not been any testimony presented that Roman was under the influence of extreme mental or emotional disturbance and that all the testimony went to the issue of Roman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and any substantial impairment thereof. The State also pointed out that the testimony from the guilt phase of the trial went to the issue of whether Roman knew right from wrong or the nature and quality of his acts (R 1579).

The defense, in requesting the instruction, acknowledged the lack of evidence presented on the issue, stating: ". . .I know the doctors were equivocal on that, but we would request an instruction based on it, the alcoholism, the other symptoms of some organic damage, based on that we would request number 2." (R 1578)

The defense now seeks on appeal to transform Roman's history of alcoholism into more than what it is and sets forth a former diagnosis of schizophrenia, Roman's IQ and stays at a mental hospital as evidence that Roman was under the influence of extreme mental or emotional distress at the

time the brutal murder was committed. The instruction was never requested on these grounds, however, but only on the grounds of alcoholism and organic damage. These new grounds cannot be raised for the first time on appeal, lest this Court be willing to conduct de novo penalty proceedings. Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court Steinhorst v. State, 412 So.2d 332 (Fla. 1982); State v. Jones, 377 So.2d 1163 (Fla. 1979); State v. Barber, 301 So.2d 7 (Fla. 1974). Furthermore, in order for any argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below Steinhorst, supra; Haager v. State, 83 Fla. 41, 90 So. 812,813 (1922); Kelly v. State, 55 Fla. 51, 45 So. 990 (1908).

There is a tendency in cases such as this to seek out mental aberration or emotional disturbance lest we be faced with the stark reality that one of our fellow human beings is capable of such savage and evil acts. We will find no comfort in this case, however, because the record will not support the contention that Roman was emotionally disturbed, either on grounds of alcoholism and organic damage or the new grounds advanced on appeal.

A review of section II of the statement of facts clearly shows that most of those who saw Roman on the night of the murder did not even believe him to be drunk. He was seen shortly after the time of the murder returning from the area where the murder occurred and he did not appear drunk (R 499;500;589A). While Roman's thinking may have been somewhat "impaired" as the trial court determined, it is also clear that on the night of the murder, the trier of fact had every reason to believe that Roman was not a man ravaged by the effects of alcohol, by either long term or short term usage. Testimony also revealed that Roman's "organic" damage was more of the phy-

sical variety than the mental. Clinical psychologist Dawn Bowers testified that Roman suffered the same slight impairment that can be found in millions of Americans who ingested alcohol over a ten year period (R 1315-1317).

Roman's own expert witness in mitigation, Dr. Langee, admitted that while Roman had been diagnosed as schizophrenic in 1968, the proper diagnosis should have been chronic alcoholism rather than schizophrenia. Roman was restored to competency long before the murder (R 1542-1543). Nor can Dr. Carrera's testimony be overlooked that he could not rule out that the symptomology displayed by Roman during his pretrial period of incompetency was the result of malingering (R 1113). The day after the murder this allegedly emotionally disturbed man was back at his roadside stand selling items to the public (R 811;816). Despite his later admission that he had seen the child at the time of the murder, he had the wherewithal when he was seen returning from the scene of the murder to respond that he had not seen the child (R 499;500;589A). No evidence was presented that Roman was acting in an emotionally disturbed manner the night of the murder. Physical evidence points to the fact that the murder itself was an act of stealth to conceal the sexual battery perpetrated upon the two year old, as she was buried with her bottle and blanket (R 671;786;772). It was also Dr. Barnard's opinion that Roman's intelligence quotient was simply in the lower end of average intelligence (R 2067).

In the past, this Court has not found evidence of either heavy drinking or marijuana smoking to be sufficiently compelling to cause mitigation of sentence. Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Compare Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 175 , 62 L.Ed.2d 714 (1979), and LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 88, 100 S.Ct. 175, 62 L.Ed.2d 714 (1979), with

Burch v. State, 343 So.2d 831 (Fla. 1977), and Jones v. State, 332 So.2d 615 (Fla. 1976). Nor has the fact that a defendant's mind wandered as a result of past use of hallucinogenics (sucking on gas) been viewed as sufficiently compelling. Hitchcock, supra.

Although consideration of all mitigating circumstances is required by the United States Constitution, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury Lucas v. State, 376 So.2d 1149 (Fla. 1979). The trial court here did not ignore medical testimony regarding Roman, rather it found, and correctly so, that the testimony did not compel application of the mitigating factor in sentencing.

In Smith v. State, 407 So.2d 894 (Fla. 1981), witnesses testified to the appellant's abnormal appearance and behavior on the evening of the shooting. A psychiatrist testified that the appellant knew right from wrong, but suffered from a sociopathic personality resulting in defective judgment. The appellant contended that such testimony proved that he was under extreme mental or emotional disturbance at the time of the offense. This Court found that the jury and the judge heard the testimony and apparently concluded that the testimony should be given little or no weight in their decisions and that it is within the province of the trier of fact to weigh the evidence presented. 407 So.2d at 902. In the case sub judice there was not even testimony as to abnormal appearance or behavior on the evening of the murder apart from Roman's sister's assertion that he was intoxicated. Similarly, mental or emotional disturbance has not been proven in this case under Smith and for the other most compelling reason, that no evidence on the issue was even presented. But had it been presented, Roman would have fared no better due to an abundance

of contradictory testimony. The testimony presented showed, at most, that any psychological or emotional disorders of the defendant were simply personality disorders. Nothing has been presented which would have the effect of requiring this Court to disturb the findings of the judge. No psychiatrist reported extreme mental or emotional disturbance. Therefore the court did err in declining to find these factors. See Scott v. State, 419 So.2d 1058, 1064 (Fla. 1982); Meeks v. State, 336 So.2d 1142 (Fla. 1976).

Further, the mere fact that evidence that Roman was of dull/normal intelligence was presented does not mean, as Roman seems to suggest, that the trial court was compelled to find this to be a mitigating factor. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 82 L.Ed.2d 864 (1982); Ruffin v. State, 397 So.2d 277 (Fla. 1981).

Testimony in the case sub judice simply does not support the giving of the requested instruction. Had the instruction been given, case law would tend to show that such a mitigating circumstance would not have been required to have been found in any event. The instruction, however, was not required. Florida Standard Jury Instructions in Criminal Cases, in its Note to Judge Following the Mitigating Circumstances Instruction instructs the judge to "give only those mitigating circumstances for which evidence has been presented." Fla. Std. Jury Instr. (Crim) Penalty Proceedings-Capital Cases, Note to Judge.

Assuming, arguendo, that the defendant had presented at least some evidence on the issue, the jury could still have considered the mitigating testimony even without the statutory mitigating instruction as the trial court did not limit their consideration to the one mitigating factor it found, but advised the jury that they could also consider "any other

aspect of the defendant's character or record, and any other circumstance of the offense." (R 2474) At the penalty phase numerous witnesses testified in Roman's defense and no limitations were placed on the kinds of matters about which they were allowed to testify. There is no reason to believe the testimony would have had a more forceful or differing effect on the jury had the instruction been couched as a statutory mitigating one, as they were still free under the instructions given to exercise leniency and spare Roman's life. They chose not to do so. It has been recognized that statutory mitigating circumstances do not encompass every element of a defendant's character or culpability in any event, however, when coupled with the jury's ability to consider other elements in mitigation, a defendant is provided with every opportunity to prove his entitlement to a sentence less than death Peek v. State, 395 So.2d 492 (Fla. 1980).

The lower court in the penalty proceeding found that the State had proven three aggravating circumstances beyond a reasonable doubt: (b) the defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person; (d) the capital felony was committed while the defendant was engaged. . .in the commission of rape (sexual battery). . .kidnapping and (h) the capital felony was especially heinous (wicked,evil), atrocious, or cruel (R 2492-2493). The court found that Roman had proven the mitigating circumstance set forth in Florida Statutes Section 921.141(6)(f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired (R 1578-1579). Roman further contends that the trial court employed an improper standard in weighing the evidence of mitigating and aggravating circumstances.

In capital cases, it is this Court's responsibility to insure

that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes in the sentencing process. It is not the function of this Court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not and then impose the proper sentence. In accordance with the statute the culling process must be done by the trial court Mikenas v. State, 367 So.2d 606 (Fla. 1979). It was so done in the case sub judice.

Section 921.141, Florida Statutes, requires the trial judge to logically consider the relationship between aggravating circumstances listed therein and mitigating circumstances and arrive at a sentence based upon reason. A sentence cannot be based upon reason if it is based on non-existent mitigating circumstances, toward which there has been presented no proof.

It is well-settled that a defendant may be competent to stand trial, yet nevertheless receive the benefit of the mitigating factors involving diminished mental capacity. See Mines v. State, 390 So.2d 332,337 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). Mines v. State, supra, has never been interpreted to require any more from a trial judge than that he give due consideration and weight to these factors in his sentence. Here the trial judge recognized the "substantial impairment" mitigating factor, but did not find the mitigating factor that the defendant was under the "influence of extreme mental or emotional disturbance" because no evidence regarding such factor was presented and he found that the mitigating factor did not outweigh the aggravating factors. This is not a case in which the jury recommended life based on evidence of mental incapacity and the trial judge rejected the recommendation, nor is it a case in which the judge failed entirely to take Roman's mental condition into account. The sentencing order demonstrates the judge's consideration of these factors. This is a case

in which Roman simply disagrees with the weight that the trial judge accorded the mitigating evidence. Mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. See Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). The trial judge was not unreasonable in failing to give great weight to the mitigating factor of "substantial impairment" which he did find to exist in spite of contradictory and conflicting evidence.

It was never shown in the instant case that Roman was mentally ill at the time of the crime or that his alleged mental illness was a motivating factor in the commission of the crimes for which he was convicted. The trial court did not ignore every aspect of the medical testimony regarding Roman, rather, it found that the testimony simply did not compel application of that mitigating factor in sentencing.

The case sub judice can clearly be distinguished from Mines v. State, 390 So.2d 332 (Fla. 1980). In Mines unrefuted medical testimony established that the appellant was a paranoid schizophrenic. Testimony in the case sub judice refutes such a diagnosis (R 1542-1543;2057;1269;1272; 1291-1292;1019;1023-1024;1113). The evidence in Mines further established that the appellant had a substantial mental condition at the time of the offense. No such evidence was presented in the case sub judice. Further in Mines the court did not consider the mitigating circumstance of extreme mental or emotional disturbance. In the case sub judice the trial court considered all evidence presented and determined that such mitigating factor was not warranted.

In any event, evidence of mental or emotional distress does not necessarily outweigh a heinous, atrocious or cruel crime Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979).

Growing up wasn't easy for Tasha Smith, as the tee shirt she was buried alive in so prophetically exclaimed (R 794). It is now an impossibility, for she is dead. Hopefully, she plays in the promised land. "Not even death is the sickness unto death, the sickness unto death is despair."* We who remain and must despairingly struggle with the awful events of this case surely die a little ourselves, for the determinations to be made do not come easily.

Ernest Roman was found to be sane and by the weight of the evidence, sober at the time of the commission of the crimes. There is overwhelming evidence of his guilt. He alone had access to the child at the time of the murder (R 564;1157). Laboratory tests confirmed that he had physical contact with the child in the abandoned trailer (R 937;941;972;760-761). His own blame-shifting statement revealed details of the crime that only one who was present at the time of the crime would know--and no one was shown to be present other than Roman (R 851-875). The man he accused of the crime was cleared of any involvement (R 843;847). Roman claimed first that another was responsible and then that he, himself, was not responsible for his acts (R 2091;855;868;875).

It is all too easy to seek absolution by claiming we are not responsible for our acts. Yet if we are not responsible, who is? The truly insane are not, yet Roman was not found to fit into that category. We are the captains of our own ships, and we steer them toward perilous or calm waters. Those who decide in favor of a reverence for life do not chart a course that leaves ruin in its wake. Those who have no reverence for the lives of others cannot expect their own lives to be held in esteem. Those

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*Kierkegaard, S., Fear and Trembling and the Sickness Unto Death, 145,147 (1974).

who would take an innocent life must expect the ultimate penalty to be exacted, not for vengeance sake, but because the ultimate act exacts the ultimate price.

It is not without great deliberation that the State asks that the ultimate penalty be exacted from Ernest Lee Roman, for it has been proven beyond a reasonable doubt that he has committed the ultimate acts of cruelty and evil, with a mind not so troubled as to relieve him of responsibility for his awful deeds.

CONCLUSION

Based on the authorities and arguments presented in the brief herein, The State respectfully requests this Honorable Court to affirm the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to ROBERT Q. WILLIAMS, Esq., WILLIAMS & SMITH, 221 North Joanna Avenue, Tavares, Florida 32778, by U.S. mail this 14th day of December, 1983.

MARGENE A. ROPER