IN THE SUPREME COURT OF FLORIDA

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WILTON AMOS ROSS,

Appellant,

vs.

CASE NO. 63,767

STATE OF FLORIDA,

Appellee.

_______________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Wilton Amos Ross was the defendant in the court below and will be referred to as Appellant or the Defendant. The State of Florida was the prosecution in the court below and will be referred to as Appellee or the State.

The following symbols will be used in this brief followed by the appropriate page number(s) in parentheses:

"R" -- Record on Appeal

"AB" -- Appellant's Brief

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Appellant contends that the evidence presented at trial was insufficient to sustain the jury verdict of first degree murder (AB 27-29). Appellant alternatively challenges the sufficiency of the evidence concerning the premeditation element of the first degree murder conviction (AB 29-31). Appellee submits that the evidence was sufficient from which the jury could conclude that Appellant was guilty of first degree premeditated murder.

It has long been established that when a criminal defendant moves for a judgment of acquittal, "he admit[s] the facts adduced in evidence and every conclusion favorable to Appellee which is fairly and reasonably inferable therefrom." Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), reh. denied, 429 U.S. 874 (1976). In reviewing the sufficiency of the evidence to support a jury verdict of guilty:

> [A]n appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981) (footnotes omitted). See also Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); Brown v. State, 294 So.2d 128, 128-129 (Fla. 3d DCA 1974).

Furthermore, the test to be applied to a motion for judgment of acquittal by both trial and appellate courts is not whether the totality of the evidence, in the opinion of the court, fails to exclude every reasonable hypothesis of innocence, but whether a jury might reasonably so conclude. Jackson v. Virginia, 443 U.S. 307 (1979); Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969); Victor v. State, 141 Fla. 508, 193 So. 762 (1940); Amato v. State, 296 So.2d 609 (Fla. 3d DCA 1974); Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981); Rose v. State, 425 So.2d 521 (Fla. 1982).

Appellant, however, makes no mention of the above standard (AB 27-31). Appellant apparently would have this Court to create an exception to the well-established standard of review based upon the facts of his case. Understandably, Appellant cites no authority to support any departure from said standard.

This Court has stated that "...when it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a difference of opinion as to what the evidence shows is required for this

Court to reverse them." Hitchcock v. State, 413 So.2d 741, 745 (Fla.), cert. denied, ___ U.S. ___, 74 L.Ed 2d 213 (1982); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Appellee submits that Appellant simply offers a "difference of opinion" as to what the evidence showed at his trial.

Further, it is well-settled that the credibility of witnesses and the weight to be given testimony is for the jury to decide. Hitchcock v. State, supra; Clark v. State, 379 So.2d 97 (Fla. 1979); Coco v. State, 80 So.2d 346 (Fla.), cert. denied, 349 U.S. 931, cert. denied, 350 U.S. 828 (1955).

The jury concluded that Appellant, with premeditation, murdered Gladys Ross (R 84, 1032-1033). The trial testimony established that Gladys Ross died as a result of a severe beating with a blunt instrument, and that numerous injuries were inflicted upon the victim prior to her death. State witness Donnie Crum testified that he discovered a body on the shore of Lake Talquin at about 9:30 a.m. on February 16, 1982 (R 353-354). He then reported it to the police (R 354). Deputy Sheriff Keith Daws responded to a call that there was a body found on the Gadsden County side of the lake (R 356-358). (The body was later identified as Gladys Ross--R 360, 393-394.) At the scene, Daws found a "blue" blanket and he otherwise secured the scene (R 358-359).

Daws later went to Appellant's houseboat at Williams' Landing and read Appellant his Miranda rights (R 360-362).

Daws noticed that the mattress on Appellant's bed was wet (R 371-372). Daws told Appellant that he wanted to talk to him about his wife, Gladys (R 372). Appellant stated "that woman gives me hell all the time" (R 372). Appellant also stated that he had last seen Gladys on Sunday [February 14] (R 372). All of the foregoing occurred before Daws informed Appellant that his wife was dead (R 362, 371-373). At the sheriff's office, Daws told Appellant that Gladys was dead, and Appellant stated that his wife put him out on the Ochlockonee River on Monday night and he did not get home until after 3:00 a.m. on Tuesday [February 16] (R 373). Daws further testified that he collected head hair samples and a blood sample from Appellant, and also took a hammer, hat, boat, and boat motor from Appellant (R 374-378).

Deloy Harrison testified that he saw Appellant on Tuesday, February 16 at approximately noon (R 390). Harrison and Don Parr were cleaning catfish at Williams' Landing (R 390). Harrison asked where Gladys was and Appellant responded that she was mad at him (Appellant) and that she was at home (R 391). Appellant also stated that his hand was sore (R 392). At the time, Appellant was driving Gladys's pickup truck, which Harrison stated was unusual because he had never seen Appellant driving it before (R 392-393).

Meloni Folson testified that she lives next to Appellant's houseboat at Williams' Landing (R 402-403). On Monday, February 15, 1982, Folson had a cold and was awake between 11:00 p.m. and midnight (R 403-404). Folson heard voices coming from the house-

boat, and specifically, she heard Gladys Ross say, "Calm down. Get a hold of yourself. Straighten up." (R 404). Folson then heard "a bump or a slamming of a door," which was the last thing she heard (R 405).

Carlton Harrison, who lived at Coe's Landing, has known Appellant for 13 years (R 407). Harrison testified that he saw Appellant on Monday about 9:00 p.m. and Appellant's clothes were damp (R 408, 420). Appellant wanted to telephone his wife, so he and Harrison went to Chuck and Ruth Bruner's trailer to call (R 409). Chuck Bruner called for Mrs. Ross three times (R 409, 420). Appellant then got a six pack of beer and some cigarettes from Bruner's store and left Coe's Landing in a boat, headed toward Williams' Landing (R 410). Harrison stated that Appellant had not been drinking and noticed nothing wrong with Appellant's hand (R 408-409, 410, 419). Harrison also stated that Appellant did not dry his clothes at Harrison's camper and Harrison did not give Appellant any dry clothes (R 423, 428).

Chuck Bruner, whose wife Ruth operated Coe's Landing, corroborated Harrison's testimony that Appellant and Harrison went to Bruner's trailer between 9:15 and 9:30 p.m., that Bruner attempted to call Mrs. Ross three times, and that he and Appellant went to Bruner's store to get a six pack of beer and some cigarettes (R 429-432). Bruner also testified that neither Harrison nor Appellant were drinking, that Appellant was wet, that he noticed no injuries to Appellant, and that he

has never seen Appellant in Gladys Ross's truck without her (R 431-434, 440).

Carl Hager, who operated Williams' Landing, testified that he received a call Monday at approximately 9:30 or 10:00 p.m. from Chuck Bruner, who asked him to look outside and see if he could locate Mrs. Ross's truck at her houseboat (R 456-458). Hager did not see the truck and he so informed Bruner (R 458). Hager testified that he saw Appellant the next morning at Williams' Landing, and Appellant looked like he had been up all night and had a few drinks (R 458). As Appellant was purchasing a six pack of beer, Hager said to him, "What's the matter? Did Gladys kick you out last night?" (R 458-459). Appellant responded, "Yes, for the last fucking time" (R 459). Hager also testified that he had never seen Appellant driving Gladys's blue pickup truck, but that Appellant was driving it that morning (R 460). A boat and trailer were attached to the truck (R 460).

Kenny Robertson, Gladys Ross's son, lived next door to his mother. On Tuesday morning he saw Appellant driving his mother's truck with a boat and trailer attached (R 466-467). Appellant parked the truck behind his house and was washing out the boat, which Robertson stated was unusual (R 467-468). Robertson also testified that he had never before seen Appellant driving Mrs. Ross's truck (R 468), and that the boat was only "half way tied on" (R 472).

Sergeant Bill Gunter was the evidence custodian in the case. He photographed the scratch marks on Appellant's face and Appellant's wounded and swollen right hand on Wednesday, February 17 (R 480-482). Florida Department of Law Enforcement Crime Laboratory Analyst Nayola Darby testified as to some aerial photographs she had taken of the Lake Talquin area (R 488-491).

Florida Department of Law Enforcement Crime Laboratory Analyst Rick Maxey saw the body of Mrs. Ross about 25 feet from the water's edge (R 495-497). Maxey gathered strands of hair from the victim's right hand, hairs and fibers from an old fallen tree at the water's edge, a green paint chip and a purple blanket (R 497). Additionally, Maxey found a pair of blue pants in a ditch at High Bluff Landing (R 498-499). Maxey also processed the Ross's houseboat at Williams' Landing (R 499). On the houseboat Maxey found a blood fingerprint on white metal support post, blood stains in 15 different places on the boat and dock (state exhibits 15-29), hairs and fibers on the floor and dock (state exhibits 30-33), green and brown sleeping bags, a two foot square section of carpet and a carpet standard, a mattress which was extremely wet and blood stained on the underside, and sweepings and fiber standards therefrom (R 499-501).

Maxey also processed Ross's mobile home. From there he collected a hatchet, a blood stained sweatshirt, and a green and pink 13 foot plywood boat that was in the backyard

(R 505). In that boat, Maxey found hairs and fibers on the front floor, hair that was caught under a nail in the front of the boat, sweepings from the edges of the boat, and several paint standards (R 506).

Maxey attended the autopsy of Mrs. Ross and collected hair from the right hand of the victim (some had already been taken from her hand at the lake--R 497) (R 507-508). Maxey also collected a head hair standard, blood sample and fingernail clippings from the victim, as well as her shirt, panties, bra, two rings and a necklace (R 508-509).

Doctor John Mahoney, the Assistant Medical Examiner who conducted the autopsy, described the various injuries to the victim. He stated that the deceased had brown hair, and that the deceased had been moved after death (R 542-546). He testified that there were extensive bruises, scratches, and lacerations over the face (R 547-548). He concluded that all of those injuries were premortem and that most of the facial injuries were made by a blunt instrument, possibly a fist or foot, but a least one deep laceration on the right cheek was made with a blunt instrument not a fist or foot (R 549-550). Doctor Mahoney also discovered extensive circumferential lacerations and contusions of the scalp (R 550-554). Doctor Mahoney determined the cause of death to be air embolization from the right side of the heart resulting in cardiac arrest, caused by the multiple lacerations to the scalp, particularly the one injury which had pushed the bone through a large vein

thus permitting air to be sucked in through the laceration and carried to the heart (R 552-555). Doctor Mahoney also stated that there were extensive injuries over the chest and shoulder (R 555-556). The doctor further testified that there were injuries to the back side of the right arm and hand and the left arm, signifying "defensive wounds" (R 557, 561-564), as well as clumps of gray hair entrapped in her right hand (the victim was right handed--R 467), and A type blood underneath her fingernails (the victim has O type blood) (R 564). The doctor also testified that the victim had sexual intercourse 24 to 48 hours prior to death or after death (R 565-566). Doctor Mahoney stated that Mrs. Ross was conscious during at least a portion of the attack (R 574).

Sergeant Robert Tricquet took Appellant's fingerprints on February 18, 1982, and also noticed that he had an injury to his right hand (R 614-617).

Florida Department of Law Enforcement Crime Laboratory Analyst Supervisor Daniel Hasty testified that the blood fingerprint on the white metal support post was Appellant's (R 625-627).

Florida Department of Law Enforcement Crime Laboratory Analyst Dorothea Mungen, a serology expert, identified the fingerprint on the white metal support post to be made in human blood (R 638). Mungen also stated that she found A type blood encrusted under the victim's nail clippings (R 633). Appellant has A type blood (R 632). The blood under the nail clippings

could have come from Appellant (R 637, 641).

Mungen further testified that the blood on the underside of the mattress, on the victim's clothing and on the dock matched the victim's blood (R 638). Mungen also stated that the blood stains in state exhibits 3, 17, 18, 19, 20, 21, 23, 24, 26, 28, 29 and 43 were human blood, and there was an "indication of blood" in state exhibits 10, 15, 16 and 27 (R 639-640).

Florida Department of Law Enforcement Microanalyst Larry Smith, a fiber examination and comparison expert, testified (through deposition) that he examined the purple blanket, fibers from the fallen tree where the body was found, fibers from the dock, sweepings from the edges of the 13 foot boat, and fibers in Appellant's head hair standard (R 648, 655-657). From his analysis, Smith concluded that the fibers in Appellant's head hair standard, the fibers from the fallen tree and the fibers from the dock, could have come from the purple blanket (R 662-663). Smith further concluded that the fibers contained in the sweepings from the boat could have and probably did come from the purple blanket (R 664).

Dennis Harwood testified that he was in the same cell block as Appellant in June of 1982 (R 679-680). Harwood became friends with Appellant and talked to him about his (Appellant's) case (R 682). One day when Appellant received his discovery, Harwood asked him if he could look at it and Appellant responded no, "you might say something and I'll have to kill you, too" (R 683). Harwood had several conversations

with Appellant while they were in jail toghether (R 690-695). Appellant eventually admitted his guilt to Harwood. Specifically, Harwood testified that Appellant left Coe's Landing in the boat and went to the houseboat. Gladys was there arguing at him. He then continually hit her with a hammer. After that, in an attempt to make it appear that someone else killed her, he had sexual intercourse with her after death, then placed the body over his shoulder and carried her out to the boat (he dropped her several times on the way). Then Appellant paddled the boat out in the lake so no one would hear the motor. He eventually started the motor and placed Mrs. Ross's body on the bank. He sheared a pin in the motor and had to paddle the rest of the way back to the houseboat (R 696-699).

Edward Thornton was in the same jail cell as Appellant and Harwood (R 723-725). Thornton corroborated Harwood's testimony about Appellant threatening to kill Harwood "just like I did my wife" (R 726).

Florida Department of Law Enforcement Crime Laboratory Analyst Linda Hensley, a hair examination and comparison expert, compared the victim's and Appellant's head hair standards (state exhibits 6 and 2, respectively) with the hair found in the victim's right hand at the lake shore and autopsy, the hair from the fallen tree at the lake shore, the hair found on the dock, and the hair found under a nail on the boat (state exhibits 1, 4, 5, 31 and 36, respectively). Hensley stated that of the

56 hairs collected from the victim's right hand at the scene, six could have come from the victim and 48 could have come from Appellant (R 747-748). Of the six hairs taken from the victim's right hand at the autopsy, five could have been from the victim and the other could have been from Appellant (R 748-749). Of the three hairs found on the fallen tree, two could have been from the victim and the other could have been from Appellant (R 750). Of the two hairs found next to the blood stain on the dock, one could have been from the victim and the other could have been from Appellant (R 751). Of the 59 hairs found under the nail in the boat, none were Appellant's and all probably came from the victim (R 752-753).

The foregoing evidence was more than sufficient from which the jury could conclude that Appellant was guilty of premeditated murder. Appellee recognizes the rule that premeditation is not presumed from the mere killing of a human being and that the State is required to prove premeditation beyond and to the exclusion of a reasonable doubt. <u>Miller v. State</u>, 75 Fla. 136, 77 So. 669 (1918). Appellee would submit, however, that premeditation, just as any other element in a criminal charge, may be proved by circumstantial evidence and there is sufficient evidence contained in the record to support the jury's verdict (the trial court agreed and denied Appellant's motions for judgment of acquittal--R 778, 941).

Premeditation, often being impossible to prove by direct testimony, may be inferred from the circumstances surrounding the homicide. <u>Crawford v. State</u>, 146 Fla. 729, 1 So.2d 713 (1941);

Daniels v. State, 108 So.2d 755 (Fla. 1959); Dawson v. State, 139 So.2d 408 (Fla. 1962); Pinkey v. State, 142 So.2d 144 (Fla. 2nd DCA 1962); Campbell v. State, 227 So.2d 873 (Fla. 1969), and the ultimate question of whether there was premeditation is to be determined by the jury. Lee v. State, 141 So.2d 257 (Fla. 1962); Larry v. State, 104 So.2d 352 (Fla. 1958); Smith v. State, 90 So.2d 304 (Fla. 1956); Daniels v. State, ~~supra~~.

Where there is evidence in the record from which the jury could rationally infer the existence of premeditation, the verdict ~~will~~ should not be disturbed on appeal. Webster v. State, 141 Fla. 374, 193 So. 303 (1940); Larry v. State, supra; Campbell v. State, ~~supra~~. This is consistent with the rule applicable in cases where the sufficiency of the evidence is raised on appeal. See: McKee v. State, 159 Fla. 794, 33 So. 2d 50 (1947); Parrish v. State, 97 So.2d 356 (Fla. 1st DCA 1957); Lee v. State, 153 So.2d 351 (Fla. 1st DCA 1963). The foregoing rule obtains because under our scheme of administering justice, the jury resolves factual conflicts.

Evidence from which premeditation may be inferred include such matters as the nature of the weapon used, the presence or absence of adequate provocation, the manner in which the homicide was committed, the nature of the wounds, and the manner in which they were inflicted. Welty v. State, 402 So.2d 1159 (Fla. 1981); Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, supra. Other factors admissible to show premeditation are the disposition of the body of the deceased

and the subsequent acts and statements of the accused. Daniels v. State, supra; 16 Fla. Jur. 2d, Criminal Law §1126.

The evidence here shows that the decedent was continually beaten about the face, head, torso and extremities with fists, feet and an unknown blunt instrument (probably a hammer). There were extensive (about 17) bruises, abrasions and lacerations, including a deep puncture wound, on her face. Also, a tooth was chipped. There were no less than six lacerations on top of her head from a blunt instrument. There were also extensive injuries to her chest and shoulder. All of these injuries were sustained prior to her death. Moreover, there were cuts on the backside of the right arm and hand and the left arm, as well as blood of Appellant's blood type underneath her fingernails, and a clump of gray hair that could have come from Appellant in her bloody right hand. These indicate that the victim was attempting to strike back at Appellant or glance off blows coming at her. She possibly grabbed Appellant's hair as she was being struck. Also, Appellant had scratches on his face after the murder that no witness noticed prior thereto. The foregoing was sufficient to provide a jury inference of premeditation.

The jury was also justified in inferring premeditation due to the manner of killing, the nature and number of the wounds, and the manner in which they were inflicted. Larry v. State, supra; Lowe v. State, 90 Fla. 255, 105 So. 829 (1925); Grantham v. State, 139 Fla. 129, 190 So. 495 (1939). In Nelson v. State,

97 So.2d 250 (Fla. 1957), the sufficiency of the evidence to sustain the verdict of premeditated murder was challenged. The pathologist testified that he examined the victim's body and in addition to numerous abrasions, scratches and bruises, he found in the chest and arms 29 small, sharp "stab wounds" which were caused by a round, sharp instrument, such as an ice pick. Also, prior to trial the accused admitted to the killing, although he maintained his innocence at trial. This Court affirmed the conviction and sentence of the Appellant:

> The testimony of the physician... so plainly demonstrated the vicious, heinous, nature of the assault that there could have been no reasonable doubt that at the outset the appellant fully intended to kill.

97 So.2d at 251. In Larry v. State, supra, the Appellant alleged that the evidence was insufficient to prove that the killing was premeditated. The doctor testified that the victim was found on the floor of his living room and was lying on his back with his neck about half severed and with cuts on both sides of his head. The doctor also said that the head was "beat to a pulp like crushed ice," which would require at least six blows with a weapon like a hatchet. Also, the Appellant admitted to the killing prior to the trial. The Supreme Court of Florida affirmed Appellant's conviction, saying that the brutality of the homicide and other factors warrant an inference of premeditation. In the case of Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 451 U.S. 916 (1981), this Court affirmed Appellant's first degree murder

conviction, finding that the physical condition of the body including the fact that the victim had been bound, beaten, and had multiple stab wounds, one of which was fatal, together with the conduct and admissions of the Appellant, were sufficient to establish premeditation.

Evidence as to the character of the weapons used, the manner of killing, the nature and number of wounds and the manner in which they were inflicted provided more than sufficient circumstances from which the jury could infer premeditation. Considering the medical testimony and the other evidence developed at trial, there were no "reasonable" explanations presented by Appellant that were not excluded.

ISSUE II

THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE JUROR ISABELLE LOCKHART FOR CAUSE.

Appellant contends that his case should be reversed and remanded for a new trial because of a possible relationship between juror Isabelle Lockhart and the prosecutor, Assistant State Attorney Willie Meggs, and the trial court refused to dismiss Ms. Lockhart for cause (AB 32-34). Appellee submits that Appellant has totally failed to establish any relationship between the juror and Meggs. Therefore, this issue in without merit.

During the voir dire examination, the trial judge inquired as to whether any of the prospective jurors knew the prosecutors or witnesses (R 210). The following occurred:

> MS. LOCKHART: I'm not sure, but Mr. Meggs may be a distant relative of mine.
>
> THE COURT: Would you hold that against him?
>
> MS. LOCKHART: I don't know.
>
> (LAUGHTER.)
>
> THE COURT: Would you tend to discount what he would argue --
>
> MS. LOCKHART: He probably doesn't recognize me, but I think I've seen him at a family reunion.
>
> THE COURT: But would that possibility or that relationship in anywise affect your ability to serve as a fair juror?
>
> MS. LOCKHART: No.

(R 213-214, emphasis added). Later, defense counsel questioned

Ms. Lockhart:

> MR. JOHNSTON: Ms. Lockhart, there's one question I forgot to ask you earlier. You indicated that you might be related to Willie Meggs.
>
> MS. LOCKHART: Yes.
>
> MR. JOHNSTON: And what degree would that be, first cousin, second cousin?
>
> MS. LOCKHART: I really don't know. I am a Stoutamire. My maiden name is Stoutamire, and I have seen him at Stoutamire reunions. Haven't I seen you at Stoutamire reunions?
>
> MR. JOHNSTON: Any place they'll give him free food. His [sic] is my worthy adversary, and I have known him for years.
>
> You feel like you are related, but you don't know to what degree?
>
> MS. LOCKHART: I don't know.

(R 265, emphasis added). Defense counsel subsequently used a peremptory challenge on Ms. Lockhart (R 296).

Thereafter, defense counsel moved to challenge Ms. Lockhart for cause:

> I'm not rearguing, but there was one other juror, a juror who was sitting in number five. It was Isabelle Lockhart, I believe. She indicated that she believed she was related to Mr. Willie Meggs. She did not know the degree of the relationship. I would maintain that the benefit of the doubt should be given to the defendant because she could equally as well be within the third degree as she could be without the third degree and, therefore, should have been allowed to be challenged for cause. I subsequently challenged her pre-emptorily [sic]. The court denied my motion for cause. I'm requesting a challenge for cause and request I be given one more pre-emptory [sic] challenge.

THE COURT: I'm going to deny the motion.

(R 296-279).

Appellee would submit that Appellant has failed to establish any relationship between the juror and Meggs. Ms. Lockhart stated that she "believed" that she "might be" related to Meggs, however, no relationship was specified. Appellant has engaged in pure speculation that the juror was related within the requisite degree for a challenge for cause. See §913.03(9), Florida Statutes (1983). This Court has stated that reversible error can not be predicated on conjecture. See Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974). See also Jenkins v. State, 380 So.2d 1042 (Fla. 4th DCA 1980) [regarding the burden of proof required to sustain a challenge for cause on the asserted basis].

Furthermore, since it is unknown from the record whether any relationship exists, it cannot be argued that the alleged relationship is within the first three degrees, as required by §913.03(9), Florida Statutes (1983).

Moreover, Appellant has not shown that the prospective juror was actually biased, which would be impossible since the juror stated that any relationship or possibility of a relationship would not in any way affect her ability to serve as a fair juror (R 213-214). Cf. §913.03(10), Florida Statutes (1983), and Hartley v. State, 214 So.2d 489 (Fla. 1st DCA 1968) [where the trial court refused to grant a mistrial on the grounds that a juror and a police officer testifying for the State were first

cousins, because the witness and the juror had not seen each other in over four years and their relationship was not close and because, upon inquiry by the trial judge, the juror stated that his relationship with the witness would not have any bearing on his ability to fairly and impartially weigh the evidence and reach a verdict].

ISSUE III

THE TRIAL COURT DID NOT ERR IN PERMITTING STATE WITNESS EDWARD THORNTON TO TESTIFY.

Appellant argues that the admission of the testimony of State witness Edward Thornton violated Fla.R.Crim.P. 3.220 because that witness' name had not been disclosed to defense counsel Johnston prior to trial pursuant to the discovery rule (AB 35). However, after thorough inquiry, the trial judge determined that Appellant was not unduly prejudiced by the omission, and Appellant has not established that the trial court abused its sound judicial discretion in refusing to impose the severe sanction of exclusion of the witness.

The sanction(s) to be imposed on a party for failure to comply with discovery requirements is a matter within the sound judicial discretion of the trial judge, and reviewing courts interfere with that exercise of discretion only with the utmost reluctance. State v. Lowe, 398 So.2d 962, 963 (Fla. 4th DCA 1981). Once a proper inquiry into the circumstances of the violation has been made, trial courts have broad discretion in determining whether previously undisclosed evidence should be admitted during trial. Brey v. State, 382 So.2d 395 (Fla. 4th DCA 1980). The trial court may, following inquiry, enter such order "as it deems just." Ali v. State, 352 So.2d 546, 548 (Fla. 3d DCA 1977).

A review of the case law, beginning with Richardson v. State, 246 So.2d 771 (Fla.1971), reveals that circumstances to be considered during inquiry regarding a discovery violation include: (a) the cause of the violation, i.e., why the witness was not disclosed to the opposition; (b) whether the violation was substantial; (c) whether the witness excluded from testifying at trial was essential to the violating party's case; and, most importantly, (d) whether the violation has prejudiced the opposition's ability to prepare for trial. See: Patterson v. State, 419 So.2d 1120 (Fla. 4th DCA 1982); Wendell v. State, 404 So.2d 1167 (Fla. 1st DCA 1981); Roberts v. State, 370 So.2d 800 (Fla. 2nd DCA 1979). Whether harm or prejudice results due to a discovery violation is a determination to be made by the trial court. Zeigler v. State, 402 So.2d 365, 372 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982).

In the present case, the prosecutor stated that Thornton's name was not listed on discovery through inadvertence and oversight and he contended that the defense was neither surprised nor prejudiced by the omission since the defense was aware of both the State's intention to use Thornton as a State witness at trial and the substance of his testimony (R 449-450, 596).

Assistant Public Defender Ed Harvey testified during the Richardson hearing that he was originally assigned the case, but had to withdraw from representation of Appellant because the State intended to call Thornton as a witness and a conflict arose since Thornton was already being represented

by the Public Defender's Office (R 532, 533, 593-594). Harvey testified that he specifically discussed Thornton's testimony with Johnston (R 531-532, 534, 538).

The substance of Thornton's testimony was that Thornton was present in the jail cell with Dennis Harwood, Billy Williams and Appellant when Appellant threatened Harwood: "I'll kill you like I did my wife." (R 451-452, 534). It was determined that this testimony was merely cumulative to Harwood's testimony (R 452). Further, Thornton's name and the substance of his testimony appeared in the statement of Billy Williams and also in the deposition of Dennis Harwood, both of which were taken almost a year prior to trial and both of which were in the defense's file (R 593-594). Additionally, the prosecutor represented that Thornton's name appeared as a witness and on witness subpoenas earlier when the case had been scheduled for trial (R 596).

After proper inquiry, the trial court allowed defense counsel to depose and investigate the witness (R 454, 598, 721). The trial court denied Appellant's motion to invoke sanctions by exclusion of the witness, finding no unfair or undue prejudice visited upon the defense by allowing Thornton to testify (R 722-723). No abuse of discretion has been demonstrated.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON SECTION 921.141(6)(b) and (f) MITIGATING CIRCUMSTANCES.

Appellant contends that the trial court erred in refusing to instruct the jury, during the penalty phase of Appellant's trial, on the mitigating circumstances of Section 921.141(6)(b), Florida Statutes (1983) ["the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."] and Section 921. 141(6)(f), Florida Statutes (1983) ["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."] (AB 36-38). Appellee submits that there was insufficient evidence presented to support either of these mitigating circumstances and that Appellant's challenge to the trial court's refusal to instruct the jury as to Section 921.141(6)(b), Florida Statutes (1983), is not preserved for appellate review.

During the charge conference, defense counsel requested the trial court to instruct the jury on the mitigating circumstance of 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, Section 921.141(6)(f), Florida Statutes (1983) (R 1092). However, there was no request for an instruction under Section 921.141(6)(b) (R 1092). The trial

judge merely offered that that mitigating circumstance did not apply (R 1092-1093). [The trial judge did instruct the jury that they may consider any aspect of the Defendant's character or record and any other circumstance of the offense (R 1093, 1109-1110).] Appellee submits that Appellant has failed to preserve for appellate review the issue of the trial court's refusal to instruct the jury as to Section 921. 141(6)(b), Florida Statutes (1983). In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), this Court stated:

> Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.... Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below....

412 So.2d at 338 (citations omitted). In Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court stated:

> The record shows that while defense counsel brought the state's non-compliance to the attention of the court, he did not interpose an objection; but rather, he deferred to the trial court's statement of the applicable law. This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.

376 So.2d at 1152. See also Florida Rule of Criminal Procedure 3.390(d). Appellant never requested an instruction as to Section 921.141(6)(b), Florida Statutes (1983), nor did he ever object to the trial court not giving it. Thus, this issue is not cognizable on appeal.

In any event, Appellee would submit that the evidence presented as to Appellant's alcohol-related problems was insufficient to support a jury instruction as to either Section 921.141(6)(b) or (f), which focus on the Defendant's state of mind at the time of the offense. The trial judge is required to give instructions on only "those mitigating circumstances for which evidence has been presented." Fla. Std. Jury Instr. (Crim., 1981 ed.), page 80. This is consistent with constitutional principles that jury instructions are given only where the evidence supports them. See Sansone v. United States, 380 U.S. 343, 349-350 (1965). See also Fla.R.Crim.P. 3.510. Although there was some testimony sub judice that Appellant might have had some beer around the time of the crime (R 837-838), this testimony was affectively negated by Appellant's own admission that "I was not drunk that night." (R 1066).

In Hall v. State, 403 So.2d 1321 (Fla. 1981), the Defendant himself testified that he had been smoking pot, taking "pills," and drinking beer and brandy prior to the murder. The Defendant stated that this testimony showed the mitigating factors of diminished capacity to appreciate the criminality of his conduct and influence of extreme emotional disturbance. This Court stated:

> Hall, however, never argued those mitigating factors to the trial court. Even if he had, the trial court could have reasonably found that this testimony did not establish those mitigating factors.

403 So.2d at 1325 (emphasis added). See also, Stone v. State, 378 So.2d 765, 773 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1164 (1982); and Simmons v. State, 419 So.2d 316, 319 (Fla. 1982). Here, the only evidence that Appellant consumed any beer on the night of the murder was the testimony of a defense investigator who stated that three weeks after the murder Carlton Harrison told him that he and Appellant drank a six pack of beer between 9:30 p.m. and midnight (R 837), and that Appellant "had been drinking" before that (R 838). However, during the trial, under oath, Carlton Harrison testified that he did not share any beer with Appellant that night, but that immediately after Appellant bought the beer, Appellant left in his boat (R 410, 424, 426). Harrison also testifed that Appellant had not been drinking prior to the time that Harrison saw him (R 408-409, 411, 419). Moreover, Appellant admitted that he was not drunk that night (R 1066).

The trial court limited the jury's consideration of the statutory aggravating circumstances to the one statutory aggravating circumstance which has been established by the evidence, i.e., that the capital felony was especially heinous, atrocious or cruel. See Section 921.141(5)(h), Florida Statutes (1983). The trial court did not limit the jury's consideration of mitigating circumstances. The trial court instructed the jury:

> Among the mitigating circumstances you may consider established by the evidence are those aspects of the Defendant's character or record or any other circumstances of the offense.

(R 1109-1110). Further, the trial court instructed the jury to base the advisory recommendation on all of the evidence presented at both the guilt and penalty phases of the trial (R 1109). The trial court also instructed the jury:

> If an aggravating circumstance is established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(R 1110).

It is evident from the foregoing that the evidence does not support the existence of the mitigating factors in Section 921.141(6)(b) and (f). Furthermore, a specific instruction as to statutory aggravating or statutory mitigating circumstances that are unsupported by the evidence would only serve to confuse the jury. Moreover, the trial judge specifically considered all mitigating circumstances prior to imposing sentence and found that none were established by the evidence (R 99-102). See also Issue V, infra.

Therefore, the trial court did not err in refusing to instruct the jury on Section 921.141(6)(b) and (f) mitigating circumstances.

ISSUE V

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

A. The trial court properly found that the homicide was especially heinous, atrocious or cruel.

Appellant contends that the evidence is insufficient to support the existence of the aggravating circumstance that the capital offense was especially heinous, atrocious or cruel (AB 39-42). Section 921.141(5)(h), Florida Statutes (1983).

This Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), explained the language in Section 921.141(5)(h):

> ... [H]einous means extremely wicked or shockingly evil; ... Atrocious means outrageously wicked and vile; and... cruel means designed to inflict a high degree of pain with little indifference to, or even enjoyment of, the sufferring of others.

283 So.2d at 9.

What is intended to be within the circumstances are:

> [T]hose capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the consciousless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9.

In the present case, the trial court found:

> The evidence confirms that Gladys Ross was the victim of a vicious, barbaric and savage murder by the Defendant. After the Defendant arrived at the Ross houseboat at Lake Talquin on the night in question, wet and cold after not having been picked up by Gladys Ross after an

evening of catfishing, he and the victim engaged in an argument during which he formed the intent to bring her life to an end. The testimony of the Medical Examiner revealed multiple lacerations and contusions about the head and face, inflicted by fists and feet, with mortal blows administered by a blunt instrument, most probably a hammer. Some of the blows inflicted were consistent with Defendant's self professed prowess as a boxer, a fact apparently unknown to the prosecution until the Defendant took the stand during the sentencing phase contrary to his attorney's advice. The puncture hammer blows fractured and depressed the skull into the brain thereby allowing air into the cranial cavity and therefrom to the heart causing death by cardiac arrest. The nature and description of the wounds by the Medical Examiner support that the victim tried to defend herself for some period of time as evidenced by lacerations to the back of the left forearm, approximately 50 hairs with microscopic characteristics identical to the Defendant's head hair found clasped in her right hand and flesh with blood type of the Defendant found under her fingernails. The documentation of diverse locations of blood pools and splatters around and about the grisly scene corroborate that the Defendant did not effect instantaneous death of the victim and that she endured torturous knowledge of her impending death with excruciating pain. The jury was instructed on this factor.

The court makes special note of that portion of the evidence presented by the Medical Examiner disclosing that not all ravaging of the victim took place before death. Prior to the sentencing proceeding, the Court forbade the prosecution to present evidence thereon or argument directed to post-death violations to the body of Gladys Ross so that such would not be considered as an aggravating factor by the jury during the penalty deliberations. Likewise, the Court excludes that evidence from consideration herein.

(R 97-98).

Findings of a trial court are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support the findings. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). These circumstances are more than sufficient to uphold the trial court's finding that the murder was especially heinous, atrocious or cruel. Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); Goode v. State, 365 So.2d 381 (Fla. 1978), cert. denied, 441 U.S. 967 (1979); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978); Breedlove v. State, 413 So. 2d 1 (Fla. 1982), cert. denied, ___ U.S. ___, 74 L.Ed. 2d 149 (1982).

The jury recommended death based on a single aggravating circumstance, and the trial court gave that recommendation great weight. The facts reveal that this was an especially torturous murder, characterized by the trial court as "vicious, barbaric and savage" (R 97). Appellant's speculations aside, the brutalization of the victim set this murder apart from the norm of capital felonies.

The trial court did not err in finding that the capital offense was especially heinous, atrocious or cruel.

B. The trial court did not fail to consider in mitigation any evidence presented at the trial.

Appellant argues that the trial court refused to consider possible mitigating evidence relating to Appellant's intoxication

at the time of the offense and past problems with alcohol, and also prevented the jury from considering it (AB 44). Appellee would submit that the trial judge and jury did consider this evidence and they rejected it.

As to the evidence that Appellant was intoxicated at the time of the offense, there was none (see Issue IV, supra). Indeed, Appellant took the stand during the penalty phase and admitted that he was not intoxicated (R 1066). Regarding the testimony as to Appellant's past alcohol-related problems, the jury was specifically instructed to consider all of the evidence presented at trial in determining whether any such evidence supports one or more mitigating circumstances (R 1109-1110, 1111). The trial judge considered all of the evidence presented and all mitigating circumstances, statutory and otherwise, and found that the evidence did not support any (R 95, 99-102). Because he failed to find any mitigating factors does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proving and the weight to be given it. Smith v. State, 407 So.2d 894, 901 (Fla. 1981), cert, denied, 456 U.S. 984 (1982); Lucas v. State, supra, at 1153.

Moreover, the jury's recommendation of a sentence of death is a strong indication that it did not find Appellant's alleged intoxication and past alcohol-related problems compelling as a mitigating circumstance. The trial judge, after considering the totality of the circumstances and exercising his reasoned judgment, adopted the jury's advisory sentence.

ISSUE VI

FLORIDA'S CAPITAL FELONY SENTENCING LAW IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT.

Appellant presents this Court with a number of constitutional challenges to Florida's capital felony sentencing law, but declines to inform the Court or Appellee of his specific arguments in that regard. Appellee will attempt to respond to the perceived challenges to Section 921.141, Florida Statutes (1981).

Appellant makes an argument to the effect that the death penalty is applied in a capricious and arbitrary fashion in Florida. This contention is without merit and has been repeatedly rejected. The mere presence of discretion in the capital felony sentencing procedure does not render the statute unconstitutional. Proffitt v. Florida, 428 U.S. 242 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); White v. State, ___ So.2d ___ (Fla. 1984) [9 F.L.W. 29]; Tafero v. State, 403 So.2d 355 (Fla. 1981); Lewis v. State, 398 So.2d 432 (Fla. 1981); Raulerson v. State, 358 So.2d 826 (Fla. 1978), cert. denied, 439 U.S. 959 (1978); Alford v. State, 307 So.2d 443 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976). Florda's statute does not violate the dictates of Furman v. Georgia, 408 U.S. 238 (1972). Proffitt v. Florida, supra.

Appellant makes several constitutional challenges to Florida's statute on the basis that it "may" violate a number of constitutional guarantees. (AB 49). Legal assertions of reversible error cannot be predicated upon conjecture. Sullivan v. State, supra. Appellee contends all such assertions by Appellant are without merit.

Death by electrocution, pursuant to a valid judgment and sentence, does not constitute cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153 (1976); Spinkellink v. Wainwright, supra; Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Alford v. State, supra.

Florida's capital felony sentencing procedure does not violate any right to trial by jury. Indeed, it is now open to question whether Lockett v. Ohio, 438 U.S. 586 (1978), requires any jury participation in capital felony sentencing procedures. Dobbert v. Wainwright, 718 F.2d 1518 (11th Cir. 1983); Lusk v. State, ___ So.2d ___ (Fla 1984) [9 F.L.W. 39].

Florida's statute does not violate principles of double jeopardy. Lusk v. State, supra; Dobbert v. State, supra; Johnson v. State, 393 So.2d 1069 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Douglas v. State, 373 So.2d 895 (Fla. 1979). Appellant's jury recommended he be sentenced to death, so Appellee is at a loss to perceive how Appellant can even assert the instant claim.

Florida's statute also conforms with due process guarantees. Ferguson v. State, 417 So.2d 631 (Fla. 1982);

Griffin v. State, 414 So.2d 1025 (Fla. 1982); Adams v. State, 341 So.2d 765 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); State v. Dixon, 283 So.2d 1 (Fla 1973), cert. denied, 416 U.S. 943 (1974). Under the circumstances of the instant case, Appellant's right to due process was not violated. The jury recommended a penalty of death and the trial court properly found a valid statuatory aggravating circumstance to exist in the face of nothing in mitigation. See Issues IV & V, supra. The sentence of death was proper. State v. Dixon, supra.

Finally, Florida's capital felony sentencing procedure does not offend equal protection principles. Clark v. State, ___ So.2d ___ (Fla. 1983) [9 F.L.W. 1]; Ferguson v. State, supra; State v. Dixon, supra.

Appellant has totally failed to demonstrate that any portion of Florida's statute violates any provision of the United States or Florida constitutions. Charles L. Black's opinion aside (AB 49), the courts of this country and of this state have repeatedly upheld the constitutionality of Florida's capital punishment statute.

CONCLUSION

WHEREFORE, based on the foregoing analysis and citation of authorities, the judgment and sentence appealed herein should be AFFIRMED.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to JUDITH J. DOUGHTERY, 906 Thomasville Road, Post Office Box 1175, Tallahassee, Florida 32302, this 1st day of March, 1984.

RICHARD A. PATTERSON

OF COUNSEL.