IN THE SUPREME COURT OF FLORIDA

HAROLD W. HOOPER,

Appellant,

vs.

CASE NO. 64,299

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS (contd.)

TABLE OF CITATIONS

TABLE OF CITATIONS (contd.)

TABLE OF CITATIONS (contd.)

TABLE OF CITATIONS (contd.)

TABLE OF CITATIONS (contd.)

TABLE OF CITATIONS (contd.)

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PRELIMINARY STATEMENT

Appellee, State of Florida, will be referred to as Appellee or State. Appellant, Harold W. Hooper will be referred to as Appellant.

References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parenthesis. References to the transcripts of testimony will be referred to by the symbol "T" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE

Appellee accepts Appellant's statement of the case as a reasonably accurate summary. However, it is incomplete.

Additional information that is relevant to the issues presented herein which were not stated by Appellant in his statement of the case is:

1. The trial court at sentencing found two (2) aggravating circumstances beyond a reasonable doubt as to Kathaleen Ruth Hooper (R 3431):

> (a) "The defendant has been previously convicted of a felony involving the use or threat of violence to some person." (R 3426)
>
> (b) "The crimes for which the defendant committed was especially wicked, evil, atrocious or cruel." (R 3430)

2. The trial court at sentencing found four (4) aggravating circumstances beyond a reasonable doubt as to Rhonda Kay Hooper (R 3431):

> (a) "The defendant has been previously convicted of a felony involving the use or threat of violence to some person." (R 3426)
>
> (b) "The crime for which the defendant is to be sentenced was committed for the purpose of avoiding arrest or effecting an escape from custody." (R 3428)
>
> (c) "The crimes for which the defendant committed was especially wicked, evil, atrocious or cruel." (R 3430)
>
> (d) "The murders (sic) were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R 3431)

3. The trial court at sentencing found no statutory mitigating circumstances.

4. The trial court at sentencing found three (3) non-statutory mitigating circumstances.

STATEMENT OF FACTS

Appellee accepts in part and rejects in part Appellant's statement of the facts insofar as Appellant fails to present the evidence adduced at trial in the light most favorable to the Appellee as the prevailing party. See Harris v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 331; Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983); Parrish v. State, 97 So. 2d 356 (Fla. 1st DCA 1957), cert. denied, 101 So.2d 817 (Fla. 1958); cf. Altchiler v. State Dept. of Professional Regulation, 442 So.2d 349 (Fla. 1st DCA 1983); Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); McNamara v. State, 357 So.2d 410 (Fla. 1978). Appellee therefore substitutes the following facts which are necessary to a resolution of the legal issues raised on appeal.

Late in the evening on the 19th of August, 1982 or in the early morning hours of August 20, 1982 Kathaleen Ruth Hooper and Rhonda Kay Hooper were murdered inside their Marsh Cove apartment. During the same period of time twelve year old Jimmy Hooper was beaten severely as he lay asleep in his bedroom inside the apartment (T 1424). Kathaleen Hooper had been stabbed to death (T 1369). Rhonda Kay Hooper had been strangled though her throat had been cut (T 1386-1389).

James Hooper, the husband of Kathaleen and father of Rhonda Kay and Jimmy, found his family in the blood stained apartment on the morning of August 20, 1982 (T 1636, 1638). Jimmy told his father his uncle Harold had beaten him (T 1428). Appellant, Jimmy's uncle, was apprehended one week later in Ohio (T 1944).

At trial, Jimmy Hooper testified that while he lay in his bedroom listening to music on the radio he heard his uncle, Harold Hooper, enter the apartment (R 1421). Shortly thereafter, Hooper came into Jimmy's room to get something out of the closet (T 1421-1422). Hooper left the room closing the door only to return sometime later (T 1423). This time Hooper was breathing heavily as if he had been running (T 1423). Hooper stood and looked into the room but then left and closed the door (T 1423-1424). Jimmy fell asleep after Hooper left (T 1424).

Later, while Jimmy lay asleep, Hooper began beating him over the head with a hard object covered by a pillow case (T 1424-1425). The severe beating left Jimmy Hooper with a fractured skull (T 1615). Jimmy kicked at Hooper and began crying and hollering (T 1425). He then apparently lost consciousness before being aroused by his father the next morning (T 1427). Jimmy Hooper testified he was positive his assailant was the Appellant, Harold Hooper, his uncle (T 1426).

Kathaleen Ruth Hooper had several stab wounds in her chest and back (T 1367-1369). Her throat had been slashed twice severing both jugular veins (T 1369). Her arms and hands contained "defensive" wounds and one finger was nearly severed apparently from grabbing the knife in her defense (T 1375-1380). She was found near the front door lying on the back portion of a chair which had been overturned (T 1502).

Rhonda Kay Hooper, a nine (9) year old child had been killed in the master bedroom (T 1279). Her body was found between the bed and the dresser (T 1281). She had been strangled by use

of a garrote fashioned out of a white dish towel and tied with two (2) knots (T 1795). Rhonda's neck had been slashed at or near the time of death although death was caused by strangulation (T 2249).

Blood consistent with Appellant's blood and inconsistent with Kathaleen Hooper's, Rhonda Hooper's, Jimmy Hooper's and James Hooper's blood was found on numerous items throughout the apartment. Blood consistent with Harold Hooper's blood was found on both walls of the hallway (T 1768, 1770, 1772); on the door to the master bedroom (T 1777); on the bedsheets in the master bedroom (T 1778-1780); on a stereo in the hallway (T 1773); in the bathroom (T 1787); in and upon a white plastic garbage bag found in the living room (T 1775); on a pillow in Jimmy Hooper's room (T 1782-1783); on Jimmy Hooper's shirt (T 1790); on Rhonda Hooper's shirt (T 1791-1793); and, on the garrote found around the neck of Rhonda Hooper (T 1797).

On the day of the double murder, Appellant spent most of the day at the Seahut Restaurant in Jacksonville (T 1879). An employee of the Seahut saw Appellant drink three (3) beers at about 6:00 p.m.-7:00 p.m. on August 19, 1982 (T 1883). She had been there since 2:00 p.m. and worked until 10:00 p.m. (T 1874). Appellant was not drunk but the employee had never seen Appellant drink before (T 1882-1883). He did not act unusual but acted normally (T 1883). Another person, Susan Harris, who knew Hooper saw him at the Seahut Restaurant drinking coffee about midnight on August 19, 1982 (T 1885). Hooper was still at the restaurant

when Mrs. Harris left at 12:15 a.m., August 20, 1982 (T 1886). She did not see Appellant drink any alcohol during the hour she and her husband were at the restaurant (T 1889).

Hooper testified that during the day of August 19, 1982 he drank 10-12 beers, at least a half bottle of wine and some whiskey (T 2102, 2140). Appellant said he was "feeling no pain" but did not testify at any time he was intoxicated (T 2098-2178). Hooper was 6'-8" tall and weighed 325 pounds (T 2141). Appellant was supposed to pick up George Rivenbark at the Greyhound Bus Station at approximately 1:40 a.m., August 20, 1982 (T 1893). Rivenbark employed Hooper occasionally and they became friends (T 1891-1898). Appellant misled Rivenbark in a business venture and he was depressed about his actions toward Rivenbark (T 1905, 2102). Appellant never made it to the bus station to pick up Rivenbark (T 2102).

Appellant further testified that after he left the Seahut Restaurant he drank some more alcohol and eventually blacked out (T 2103). He had decided to return to Ohio rather than face Rivenbark (T 2102). He testified he decided to stop drinking and go back to the Marsh Cove Apartment to get some rest (T 2104). He testified he parked the car in the parking lot near the apartment (T 2105), got out and lit a cigarette (T 2105-2106), noticed there were no lights on (T 2106), noticed the curtains on the window was drawn and his sister-in-law's (Kathaleen Hooper) bedroom light was on (T 2106). He tried the door but it was locked (T 2106). He tried the window and knocked on the door (T 2106). He testified he then went to his nephew's window

(Jimmy Hooper) and threw some pebbles at it getting no response (T 2106). He said he tried the door again, knocked two or three times and got no response (T 2106). He tried the pebbles again and then the door one more time (T 2106-2107). He testified he then went to the rear of the apartment to attempt entry via the sun porch (T 2107). He climbed up, reached across and grabbed on with one foot and swung the other foot up getting on the porch (T 2107). He then said he was able to enter through an unlocked sliding glass door (T 2108).

When Appellant entered the apartment he testified he heard something like feet running (T 2108). He said he confronted someone he thought was the maintenance man in the living room (T 2108, 2144). He said he thought he had seen the man before (T 2126). The man allegedly hit Appellant knocking him out but Appellant was not sure what had happened (T 2108-2109). He said he found the victims and checked for a pulse but could not locate one (T 2111, 2172). Appellant testified he was not feeling the effects of the alcohol he was drinking earlier but was effected by the blow to the head (T 2111). Appellant said he could not find a telephone, went out the door, ran down to his car, ran into a tree and did not realize where he was until he was near Macon, Georgia (T 2112). He then drove to Cincinnati, Ohio staying at the Salvation Army (R 2112-2113) using his real name (T 2115).

One week after the double murder, Ohio police went to the Salvation Army looking for Appellant. He heard the police were looking for him and ran to the roof of the second story of a building (T 2117). He went to the edge contemplating suicide (T 2118). He then broke a window using the glass to cut his

wrists (T 1915, 2118). He eventually surrendered to police (T 1953). During the episode on the roof Appellant told one of the officers "when I left him, he was OK" (T 1952). Appellant also said, "I took the money, but I didn't take the gun" (T 1952). Both statements were a part of the conversation between Appellant and the police officer who responded to the suicide attempt (T 1952). Neither statement was the result of a question having been posed to Appellant (T 1952). Appellant testified the statements referred to George Rivenbark (T 2150). Hooper also testified he usually carried a knife (T 2159). Additional facts will be discussed as they relate to the issues presented.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN REQUIRING HOOPER'S PRESENCE IN CHAMBERS DURING INDIVIDUAL VOIR DIRE AS SUCH WAS A CRITICAL STAGE OF THE PROCEEDING AND A CAPITAL DEFENDANT'S RIGHT TO BE PRESENT IS NONWAIVABLE.

Appellant contends he should have been allowed to waive his presence during individual voir dire which was conducted in chambers (Appellant's Brief at page 8). Allegedly, he attempted to waive his presence due to his large size because he thought it would be intimidating to the prospective jurors (T 300). Appellant, at the time of his trial was six foot eight inches tall (6'-8") and "extremely large" (T 300). At the time he committed the murders in this case Appellant weighed approximately 325 pounds (T 2141). The trial court initially granted Appellant's motion but it later reversed itself and denied the motion (T 300, 311).

As Appellant states in his Initial Brief at page 8, a defendant has a constitutional right to be present at the critical stages of his trial where fundamental fairness might be thwarted by his absence. This right derives from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). However, a capital defendant (as is Appellant) may not waive his presence at a critical stage of

the proceedings. See Proffitt v. Wainwright, 684 F.2d 1227, 1258 (11th Cir. 1982); modified on rehearing, 706 F.2d 311 (11th Cir. 1983), appeal pending, ___ U.S. ___; Hall v. Wainwright, ___ F.2d ___ (11th Cir. 1984), opinion filed May 16, 1984.

The case law in this area is replete with defendants arguing they were prejudiced because they were not present at a critical stage. However, Appellant cites Francis v. State, 413 So.2d 1175 (Fla. 1982) in arguing that he, if he chooses to do so, may voluntarily absent himself from all portions of the trial. This is not the law at this time.

As stated earlier, the law in this jurisdiction is that a capital defendant may not waive his presence during a critical stage as his right to presence is nonwaivable. Proffitt, supra; Hall, supra. Francis is factually distinguished from the case sub judice in that Francis was absent during a critical stage of his trial but his absence was not voluntary. He had been excused momentarily to use the restroom. While he was out of the courtroom his trial lawyer began exercising peremptory challenges to prospective jurors. Francis, supra at 1178. In the case sub judice, Appellant attempted a voluntary waiver of his presence during the entire individual voir dire. (T 300) (Emphasis supplied).

In Hall, supra, the defendant waived his presence during several stages of his trial. The district court held the trial stages were not crucial, however, the Eleventh Circuit reversed in part for an evidentiary hearing on Hall's absence from the courtroom. Hall, supra. The defendant (Hall) argued that he may not waive his presence in a capital case, and therefore, his

absence violated his due process rights. As the Eleventh Circuit pointed out, the precedence in this circuit suggests that Hall's absence during the jury may constitute error. United States v. Benavides, 549 F.2d 392 (5th Cir. 1977). Furthermore, the Court said, "We read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial." Hall, supra.

That the jury selection is a crucial stage of the trial is without question. This Honorable Court made it abundantly clear that the arbitrary nature of peremptory challenges requires the defendant's presence to consult with counsel during the time of the exercise. Francis, supra at 1179. (Emphasis supplied). This Court also noted that Florida Rule of Criminal Procedure 3.180(a)(4) recognized the examination, challenging, impanelling and swearing of the jury as crucial stages in the trial and that defendant's presence is necessary. Accordingly, Appellant's reliance on Francis is misplaced as Francis' involuntary absence was at a crucial stage of the trial as defined by Rule 3.180 and constitutional principles of fundamental fairness were thwarted by his absence. Francis, supra at 1177.

This Honorable Court has not answered the question of whether a defendant's involuntary absence during a noncrucial stage of a trial for a capital offense would be error. Nor has it found it necessary to answer the hypothetical question left open in Francis; whether the defendant's voluntary absence during a crucial stage of the trial of a capital offense constitutes error. Francis at 1178. See Herzog v. State, 439 So.2d

1372 (Fla. 1983) where this Court held a voluntary absence during a motion to suppress was not error even irrespective of the waiver by defense counsel. Id. at 1376. This Court has held even prior to Proffitt in accord with Appellee's position that Appellant cannot voluntarily waive his presence in a capital case at a crucial stage of the trial.

In Holton v. State, 2 Fla. 476, 500 (1849), the Court said:

> During the trial of a capital case (the whole trial) the prisoner has a right to be and must be present. No steps can be taken by the court in the trial of the cause in his absence. The prisoner charged must be present in court to make his objections to any and every step that may be taken which he may deem illegal.

Furthermore, in Morey v. State, 72 Fla. 45, 72 So. 490 (1916) reiterated the above rule of law by saying:

> We deem it advisable, however, to say that such an irregularity should under no circumstances be permitted. The legality of a conviction under such circumstances is very doubtful. During the whole of the trial of a capital case the defendant is required to be present, and it is exceedingly doubtful if he may by his voluntary act dispense with the necessity of being present during all of the argument of counsel. Holton v. State, 2 Fla. 476; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872; Adams v. State, 28 Fla. 511, 10 So. 106; Lovett v. State, 29 Fla. 356, 11 So. 172; Summeraus v. State, 37 Fla. 162, 20 So. 242; Menefee v. State, 59 Fla. 316, 51 So. 555; Blocker v. State, 60 Fla. 4, 53 So. 715.

However, this Court in both Francis, supra and Herzog, supra, continued to note the case of Lowman v. State, 80 Fla. 18, 85 So. 166 (1920) which appears at first blush to contradict Holton

and Morey. Upon further consideration, Lowman reinforces Appellee's position here as evidenced by its notation that Lowman was absent from his trial for only a few moments and his counsel was present during the time in question (juror qualification). This Court noted that at that time ". . . the general right of the defendant to be present at every material step taken in his trial for a capital offense cannot be waived by him." It pointed out also that some statutes "authorize the defendant to waive his right to be present at least at times during his trial, even for a capital offense" and that "such statutes are sustained . . . ." The Court said:

> The charge in this case is a capital offense, but the Constitution does not expressly require the presence of the defendants in the courtroom during the whole time of their trial for even a capital offense, and as the defendants met the witnesses against them face to face and had an impartial jury, and as the absence of the defendant's from the courtroom was voluntary and only for a few moments, and as no harm to either of them seems possible and no harm is claimed to have resulted to either of them from their voluntary absence, the constitutional requirements have been complied with. (Emphasis supplied)

85 So. at 170.

The Lowman decision is not inconsistent with Appellee's position in this case. The Lowman Court noted that he (and his co-defendant) were voluntarily absent from the juror qualification for only a few moments. What distinguishes this case from the case sub judice is that Appellant attempted to waive his presence during the entire individual voir dire in chambers. Furthermore, Appellant was not free to come and go as he pleased as was Lowman

as Appellant was in the custody of the sheriff. Neither is the Lowman decision inconsistent with Francis, supra, Herzog, supra, or Proffitt, supra.

Appellant argues he was prejudiced by the trial court's denying him a right to waive his presence at individual voir dire due to his size. The record reflects and the trial court noted that the prospective juror sat at one end of a table large enough for eight persons while the judge sat at the other end (T 2738). Appellant sat to the immediate right of the judge with Appellant's two trial counsel to his immediate right between him and the prospective juror (T 2738). Furthermore, there were two baliffs present in chambers to provide protection (T 2738).

Appellee contends that any prejudice, if any, the Appellant may have suffered was properly weighed by the trial court with the defendant's need to be present to observe, hear and participate in the voir dire process so a constitutional claim could not be raised later. It is very unusual that a person complains because his rights are protected rather than violated. If the court had granted Appellant's motion not to be present there is no doubt Appellant would have argued the trial court erred because fundamental fairness would have been thwarted. If any prejudice came to Appellant by the court's protection of Appellant's right it was harmless. The trial court's denial of Appellant's motion should be affirmed.

ISSUE II

THE TRIAL COURT DID NOT ERR IN REFUSING TO EXCUSE VENIREMAN HAGAN FOR CAUSE OR IN DENYING APPELLANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

Appellant contends the trial court erred in not excluding venireman Donald Hagan for cause because of his alleged unambiguous decision to automatically recommend the death penalty for any murder (Appellant's Brief at 10). He also contends the court erred by denying his request for additional peremptory challenges (Appellant's Brief at 14). Both of these contentions by Appellant are without merit.

The trial court in an effort to keep from having the entire venire tainted by the questioning and possible answers in regards to the death penalty and publicity, indicated it intended to hold individual voir dire in chambers prior to the general voir dire (T 289). There was no objection to this procedure (except as discussed in Issue I above pertaining to Appellant's presence) and the court asked both trial counsel to submit questions in writing (T 289). Appellant's trial counsel requested that he be allowed to question the individual venireman and the trial court expressed its intention to thoroughly explore their knowledge of the case but the procedure would be modified as needed as they moved along (T 297). The court further announced its intention to bring all 78 prospective jurors back to chambers, one at a time, so they could be questioned individually regarding their knowledge of the case and their feelings about

the death penalty (T 298). Again, there was no objection by either party to the procedure. Furthermore, at the conclusion of each individual voir dire the court instructed the venireman not to discuss what had transpired in chambers (T 347). After each venireman was brought into chambers the trial judge explained the maximum penalty for murder in the first degree, that the trial was bifurcated and the function of the jury in the case. The same procedure was utilized with venireman Hagan (T 533-534). Thereafter, the following colloquy took place in regards to the death penalty with Mr. Hagan (Hagan's qualification as a juror in the guilt phase is not at issue and those questions and answers pertinent to guilt have been edited):

> MR. BURGESS (State):
> Q: If the facts and the evidence were proper in a particular case and the judge instructs you as to the law, could you follow the law and impose the death penalty?
>
> MR. HAGAN:
> A: Yes, sir.
>
> MR. BAKER (Defense):
> Q: Do you feel in a first degree murder case--for the sake of argument and only for the sake of argument--if Mr. Hooper should be found guilty, death should automatically be imposed?
>
> A: Yes.
>
> Q: Do you feel that because a child is the victim in the case, death should automatically be imposed?
>
> A: Yes.
>
> MR. BURGESS:
> Q: Mr. Hagan, in spite of your views about first degree murder, can you put aside your views and follow the law the judge instructs you?
>
> A: Maybe I misunderstood you--yes, sir.
> (Emphasis supplied)

Q: I believe you are going to be instructed regarding the law to what you are supposed to do. Could you follow that law as instructed by the judge?

A: Yes, sir.

Q: And put aside your views and follow the law?

A: Yes, sir.

MR. BAKER:
Q: Mr. Hagan, if the judge instructs you that death is not automatically to be imposed in a first degree murder case -- I'm assuming for the sake of argument and argument alone that we ever reach that phase -- would it still be difficult for you to do anything other than impose death?

A: I assume I'm coming on strong on death. I didn't mean to be that way. I've just been raised in the Baptist Church all my life, and I guess when you read the Bible and listen to it, "an eye for an eye." I guess for first degree murder, that should be. (Emphasis supplied)

Q: I guess what I'm asking you is if the law comes in conflict with the teachings of your Church, the higher law, which law would you follow? I realize it is a difficult question, and there is no right or wrong answer.

A: If I had the choice, if he was to receive life imprisonment, and then in my mind if I felt like the death penalty -- could I go along with it -- yes, sir.

Q: Well, the judge of course is not going --

THE COURT:
Let me instruct the witness at this time.

MR. BAKER:
Yes, Your Honor.

BY THE COURT:
Q: Mr. Hagan, assuming you get that far, just for the sake of argument, after you have heard the evidence at the second phase of the trial, then the Court will instruct you on the law of the State of Florida; the Court will give you certain circumstances that you must find before the death penalty can be imposed, and the State would put on circumstances to show you why you should, and the defense

would put on circumstances to show you why you should not in mitigation. And the Court would instruct you with regard to that law.
Now, the question before you at this time is, notwithstanding a feeling that the death penalty, the "eye for an eye" or "tooth for a tooth" philosophy, would you follow the Court's instructions of law?

A: Yes, sir.

(T 533-539). It is abundantly clear that venireman Hagan was not so irrevocably committed nor did he express an unyielding conviction and rigidity of opinion regarding the death penalty that he should have been excused for cause. Chandler v. State, 442 So.2d 171, 173-174 (Fla. 1983); Witherspoon v. Illinois, supra.

While Appellee agrees that an accused has a right to a jury composed of impartial persons and that a challenge for cause should be granted when the juror is shown to harbor bias against the accused in the sentencing aspect of a capital case, the State also enjoys the right to an impartial jury. Further, impartiality requires not only freedom from jury bias against the accused, but freedom from jury bias for the accused and against the prosecution. Spinkellink v. Wainwright, 518 F.2d 582, 596 (5th Cir. 1978). Here, Appellant claims the court erred in denying his challenge for cause of venireman Hagan on the basis of bias due to his alleged predilection to impose the death penalty. Appellee submits the record indicates otherwise and that in any event, (1) Appellant has not shown the existence of manifest error in the judge's discretion not to excuse Hagan for cause,[1] and (2) Appellant has not shown that Hagan would automatically vote for the death penalty regardless of the evidence or the circumstances or that

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[1] Patton v. Yount, ___ U.S. ___ (1984), Case No. 83-95, opinion filed June 26, 1984, 35 Cr.L. 3152.

his attitude was such that would prevent him from making an impartial decision as to the guilt of Appellant. Singer v. State, 109 So.2d 7 (Fla. 1959); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979); Witherspoon v. Illinois, infra.

Appellee recognizes that where a prospective juror states he would impose nothing less than the death penalty, or render no other verdict than one requiring the death penalty, that an excusal for cause is justified. Stroud v. United States, 257 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), 251 U.S. 380, 405 S.Ct. 176, 64 L.Ed. 317 (1920). A venireman who believes that the death penalty should automatically and in every case flow from a conviction of first degree murder must be excused. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983). However, a review of the entire voir dire examination of Hagan fails to show he was unequivocally in favor of voting for the death penalty. At no time did he say he was inalterably opposed to recommending life sentences for convicted murderers. Hagan's statements indicated a tendency in favor of the death penalty but that in itself is insufficient to justify excusal for cause. Chandler v. State, supra.

The issue before this Honorable Court is the "mirror image" of the issue decided in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 776 (1968), and has been considered by this Court in Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). In Fitzpatrick, four veniremen were challenged for cause by the defense on the ground of bias in favor of the death penalty:

Two of the veniremen stated the death penalty was appropriate for anyone who committed a murder, one felt death proper if there were eyewitnesses to the murder, and one felt death should be imposed anytime a police officer is shot in the line of duty. These answers were given in response to defense counsel's general questions about the death penalty. The State explained Florida's death penalty law to the veniremen and asked if they could follow the court's instructions and weigh aggravating and mitigating circumstances, to which all answered in the affirmative. This Court distinguished Thomas v. State, 403 So.2d 371 (Fla. 1981) [veniremen stated he could not recommend any kind of mercy under any circumstances if defendant convicted of murder], explaining that the veniremen in Fitzpatrick only indicated a tendency towards favoring the death penalty, as opposed to being inalterably against recommending life sentences for convicted murderers. This Court then applied the "mirror image" of Witherspoon:

> Witherspoon requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before the trial to voting against the death penalty under any circumstances or where their views on capital punishment would interfere with finding the accused guilty. We find that the same standard should be applied when excusing for cause a venireman who is in favor of the death penalty. A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances. (Emphasis supplied)

437 So.2d at 1075-1076. Thus, as the converse of a Witherspoon challenge, the court need not excuse the venireman unless the

venireman makes unmistakably clear (1) that he would automatically vote for imposition of the death penalty without regard to any evidence that might be developed at the trial, or (2) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt or innocence. Appellant has failed to show either of these circumstances in regard to Hagan.

This case differs from Thomas v. State, 403 So.2d 371 (Fla. 1981) where the trial court erroneously denied the defendant's challenge for cause of a juror who admitted he could not recommend any mercy in any required sentencing phase under any circumstances. In Thomas, after the juror stated he would impose death if guilt was proven, defense counsel asked the juror if he could recommend mercy, in any event, to which the juror replied "no." Defense counsel repeated the question as to a recommendation of mercy in any event and again received "no" as an answer. When the state attorney attempted to rehabilitate, the juror stated that under no circumstances would he recommend mercy. The important distinction between Thomas and the present case is that Appellant's defense counsel generally failed to ask the prospective jurors whether they felt that they would "under no circumstances consider the possibility of mercy." See Poole v. State, 194 So.2d 903 (Fla. 1967); Patterson v. Com., 283 S.E.2d 212 (Va. 1981), cited by Appellant; where the Court, in holding that veniremen biased in favor of the death penalty can be eliminated for cause, recognized the following question should have been asked: "Do you feel that regardless of the facts or circumstances that in

every case of murder the death penalty should be imposed," since that question explores the venireman's predilection for imposing the death penalty. No such question was asked in the instant case. In fact, after Hagan said he would automatically recommend the death penalty in a first degree murder case and in the case of the murder of a child, he said, "Maybe I misunderstood" (T 538). It is clear defense counsel's questions were designed to get the exact response given by Hagan. The questions asked were incomplete and misleading. Regardless, Hagan indicated that he could weigh the circumstances in aggravation and mitigation, listen to the instructions on the law and put aside his feelings and judge the case entirely on what happened in the courtroom (T 537-539).

Venireman Hagan did not indicate he had a preconceived opinion as to the guilt or innocence of Appellant. Nor did he believe he had a duty to recommend death in every case where an accused is found guilty of first degree murder. Further, he did not indicate that he could never recommend mercy in such cases, under any circumstances. Instead, he indicated only that he could recommend the death penalty in a proper case after hearing all the evidence. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). "In other words, the veniremen (sic) indicated only that they [he] would be willing to perform their (his) civic obligation as juror[s] and obey the law." Spinkellink v. Wainwright, supra at 594. Defense counsel here did not ask enough questions to demonstrate that venireman Hagan's previously expressed tendency in favor of the death penalty would cause Hagan to (1) automatically vote for imposition of the death

penalty without regard to any evidence that might be developed at trial, or (2) to be unable to make an impartial decision as to Appellant's guilt or innocence.

It is important to note that based upon this record, if the converse situation had occurred, i.e., venireman Hagan had expressed opposition to the death penalty and the State had asked the questions asked by defense counsel in this case, the State could not have excused him for cause under Witherspoon because there would be an insufficient showing. Appellant has not shown that the trial court erred in denying his challenge, as Appellant did not develop the questioning far enough to show justification for excusal.

In any event, Appellant's contention that the court's failure to grant the challenges requires reversal of both the conviction and sentence is without merit. Even if the trial court had erred, which it did not, the only relief permissible would be reversal of the sentence and not the conviction of guilt. Witherspoon v. Illinois, supra; Thomas v. State, 403 So.2d 371 (Fla. 1981), J. Alderman concurring in part, dissenting in part. This is true especially since the challenged juror was not challenged on the basis his views on the death penalty would taint the determination of guilt or innocence. A juror qualified by unconstitutional standards respecting punishment is not necessarily biased with respect to a defendant's guilt. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). See also Chandler v. State, supra, J. Adkins concurring in part, dissenting in part.

Finally, Appellant contends the court erred by denying his request for additional peremptory challenges. Florida Rule of Criminal Procedure 3.350 states:

> Each party shall be allowed the following number of peremptory challenges:
>
> (a) Ten, if the offense charged is punishable by death or imprisonment for life;
>
> (e) If an indictment or information contains two or more counts or if two or more indictments or informations are consolidated for trial, the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, but in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulate maximum based on the number of charges or cases included when it appears that there is a possibility that the State or the defendant, may be prejudiced. The State and the defendant shall be allowed an equal number of challenges.

The trial judge below allowed each side 30 peremptory challenges (T 278). However, under the rule set out above he was only authorized to give a maximum of 26 peremptory challenges. (Ten each for the capital murders and six for the attempted first degree murder). Therefore, Appellant as well as the State were given the benefit of four (4) additional peremptory challenges not allowed by the Rules of Criminal Procedure. See also Fla. Stat. §913.08.

Appellee submits Appellant has failed to show manifest error by the trial court or that Hagan should have been challenged for cause. The judgement and sentence should be affirmed.

ISSUE III

APPELLANT WAS NOT DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT EXCUSED VENIREMAN MUSGROVE FOR CAUSE.

Appellant claims he was denied due process of law because the trial court excused venireman Musgrove for cause due to his limited education and that he was a slow reader (Appellant's Brief at 14). Although these are factors given by the trial judge in excusing Musgrove (T 592-593), the record reflects other factors which the court heard that would, in themselves, allow a challenge for cause (T 584-593).

While Appellant claims Musgrove should not have been excused for cause, it must be remembered that a trial court has wide discretion in determining the competency of a prospective juror and in the absence of an abuse of discretion or manifest error his decision should not be disturbed. Christopher v. State, 407 So.2d 198 (Fla. 1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1981). Singer v. State, supra; Ashley v. State, supra; Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981); General Foods Corp. v. Brown, 419 So.2d 393 (Fla. 1st DCA 1982); Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983); United States v. Tegzes, 715 F.2d 505 (11th Cir. 1982).

While the record of the individual voir dire of Musgrove is not lengthy (10 pages) Appellee will not recite the entire session here. However, the following colloquy clearly shows the trial court had ample reasons to excuse venireman Musgrove for cause:

MR. BURGESS:
Q: Mr. Musgrove, after you have heard the evidence and the Judge instructs you as to the law, could you recommend the death penalty if the facts warrant it?

A: I don't know whether I could or not.

Q: Even if the Judge instructs you as to what the law is?

A: I don't know whether my conscience could say whether this man has got to die or not.

(T 586).

BY THE COURT:
Q: Let me tell you, the Court is not bound by the recommendation of the jury. The jury may recommend death, but the Court may impose life. The Court is not bound by that -- the jury may recommend life, and the Court impose the death sentence. Will that information, will that be helpful to you? Would that alter your answer.

A: Well, that might help me as far as my conscience, that it might not be on my shoulders all the rest of my life that a man died because I recommended it.

Q: Do I understand then, in response to the question, in the proper case, in other words, if the facts and the law warranted it, would you be able to return a verdict advising the Court or recommending the death penalty, knowing that the Court would follow or reject it?

A: I guess so. I don't know -- I'm really not sure.

MR. BURGESS:
Q: Mr. Musgrove, I think we understand your view at that point, but let me ask you this: Knowing the fact that Mr. Hooper was found guilty of first degree murder and the death penalty could ultimately be imposed, could you sit in judgment of Mr. Hooper as to his guilt or innocence of first degree murder?

A: I guess I could sit in judgment as to his guilt or innocence, but as far as the other part, I don't think I could.

(T 586-587).

Q: Have you heard anything about this case?

A: Not from what I read. I don't read very much.

Q: Is it based on what you read in the Nassau County Record?

A: I don't read it. I can't read or write.

Q: Can you put aside whatever you know about this particular case and judge it solely from what you hear in the courtroom?

A: I guess I could, but I don't want to be on the jury; let me say that before I go any further.

Q: Can you explain to us why?

A: My reason why?

Q: Yes, sir.

A: Well, I would just rather not be sitting on the jury. As far as saying that somebody is guilty or ain't guilty, I might have a reason; and then it would always be in my mind.

Q: Is there any other reason you don't want to sit on this jury?

A: Mostly -- another reason is having to sit, and my nerves ain't all that good. Just like yesterday, sitting in the courtroom, I about scratched myself raw sitting there.

BY THE COURT:
Q: Mr. Musgrove, you say you do not read or write?

A: No, sir; I do enough to get by, but as far as sitting down like you all do, I don't read.

Q: If someone handed you a document to read during the course of the trial, can you read anything at all?

A: I can read enough to figure out what is going on, but something you all might learn in 30 seconds, it might take me three or four minutes or five minutes.

(T 588-589).

As stated earlier, an accused must show the trial court committed manifest error by abusing its discretion before an appellate court should disturb that decision. The record clearly reveals that Musgrove could have been excused for cause for several other reasons in addition to those articulated by the trial judge. First, while Musgrove appeared to be somewhat ambiguous in the early questioning it became abundantly clear that his conscience would not let him recommend a death sentence upon any man. He unequivocally stated: "I guess I could sit in judgment as to his guilt or innocence, but as far as the other part, I don't think I could." Later, he clearly, unequivocally and unambiguously said, " . . ., but I don't want to be on the jury; let me say that before I go any further." (Emphasis supplied). This response shows with extreme clarity that Musgrove's conscientious scruples against recommending the death penalty on any man disqualified him under the Witherspoon test. Witherspoon v. Illinois, supra. See Fla. Stat. §913.03(3).

Secondly, venireman Musgrove indicated by sitting on the jury his nerves would be affected. Evidently, Mr. Musgrove's nervous condition manifests itself by itching of the skin, a malady which can be quite uncomfortable. Florida Statutes, §40.013(5), statutorily authorizes a judge to use his discretion to excuse a juror who is ill or physically infirm. The relevant section reads as follows:

> A presiding judge may, in his discretion, excuse . . . a person who is physicially infirm for jury service.

Based on the venireman's response that one of the reasons he did not want to sit was his nerves, the trial court did not abuse its discretion, especially in light of the fact the trial would last for a week or longer.

Finally, venireman Musgrove indicated he did not read or write--enough to get by, but as far as sitting and reading, he didn't. It is impossible to look at and read from an ice cold record what a person's level of intelligence is. However, a trial judge has the benefit of hearing and seeing the prospective juror taking note of voice inflection and the person's demeanor while responding to the questions posed. It is for these reasons an accused on appeal must show the trial court abused its discretion and committed manifest error in excusing a prospective juror for cause. Christopher v. State, supra; Singer v. State, supra; Ashley v. State, supra. See also Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981).

Since the Appellant has failed to meet the heavy burden of showing manifest error or an abuse of discretion the trial court's excusal for cause of venireman Musgrove must be sustained.[2] The judgment and sentence should be affirmed on this issue.

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2 Ambiguity in testimony of the cited jurors who were challenged for cause is insufficient to overcome the presumption of correctness owed to the trial court's findings. Patton v. Yount, supra.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S REQUESTED JURY INSTRUCTION ON VOLUNTARY INTOXICATION WHERE DEFENDANT'S THEORY OF DEFENSE WAS THAT HE DID NOT COMMIT THE CRIME OF FIRST DEGREE MURDER.

Initially, Appellee notes Appellant has claimed the trial court's denial of Appellant's requested jury instruction denied him due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Florida Constitution (Appellant's Brief at 17). However, it should be noted Appellant did not raise "due process" or a federal claim as legal grounds in the trial court below. Therefore, the issue as presented on appeal has not been properly brought before this Honorable Court for resolution. In order for the Court to review an alleged error in the court below, only the specific legal grounds raised in the motion, objection or exception will be considered on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Appellee will nonetheless address the issue in the event this Court decides to rule on the merits.

Appellee agrees with Appellant's contention that a defendant at trial is entitled to a jury instruction on the theory of his defense. (Appellant's Brief at 19). See Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976). In order to be entitled to the instruction he must timely request it be given; it must describe a legally recognized defense; and, there must have been some competent evidence adduced at trial to which the instruction may be fairly applied to his theory. Palmes v. State, 397 So.2d 648

(Fla. 1981), cert. denied, 454 U.S. 882 (1982). Appellee disagrees with Appellant, however, whether under the guidelines set forth above, the trial judge properly denied Appellant's requested jury instruction on voluntary intoxication notwithstanding Appellant was charged with two counts of first degreed murder and one count of attempted first degree murder, all specific intent crimes. Appellee submits and vigorously asserts the judge properly denied the requested instruction. A defendant, as in this case, whose theory of defense is that he did not commit the acts which led to the charges against him and who entered substantial evidence at his trial that someone else committed the murders cannot alternatively raise a defense that he was intoxicated and was therefore unable to form the requisite specific intent due to his alleged intoxication. These defenses are wholly inconsistent. See Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977). In other words, either the accused did not commit the acts which constitute the crime alleged or he committed the acts which satisfy the elements of the crime but was intoxicated to the extent of being incapable of forming the essential elements of specific intent. This is especially true based on the facts and circumstances in this case. Such defenses are inconsistent when raised alternatively and should not be allowed. Appellee also agrees with Appellant's assetion that the evidence adduced at trial was sufficient to warrant a jury instruction on voluntary intoxication. However, voluntary intoxication was not Appellant's theory of defense so the denial to give the instruction was proper. Finally, Appellant has failed to show actual prejudice due to the trial court's refusal to give the instruction.

As a preliminary matter, the Court should be aware that Appellee recognizes there may be scenarios in which an accused denies he committed the criminal acts which led to the charge and still avail himself of the defense of voluntary intoxication. However such is not the situation in the case sub judice. On the facts of the instant case the defense of intoxication is wholly inconsistent with the defense presented at trial and the trial judge properly denied the requested jury instruction.

Appellee asserts that Appellant's theory of defense was that someone other than he committed the murders of his sister-in-law and niece and attempted to murder his nephew. At no time during the trial did Appellant explain or rely on the defense of intoxication. It was the prosecution who took the position in its case-in-chief that Appellant's drinking gave him the courage to commit the murders. The record bears out Appellee's contention as will be shown with utmost clarity.

The prosecutor, in opening remarks explained the testimony would show Appellant had been drinking the afternoon and evening prior to the murders and that Appellant committed the murders in the early morning hours on August 20, 1982 (T 1268-1275). Appellant's counsel waived his opening statement opting to reserve until the close of the State's evidence (T 1275). A careful reading of the record clearly indicates what theory of defense Appellant's counsel relied upon after having had the opportunity to hear the evidence the prosecution presented and after having cross-examined all of the State's witnesses. Furthermore, Appellant's own testimony clearly and unambiguously indicates

his theory of defense was that someone else did it (T 2108, 2126, 2127, 2135).

In support of his theory, Appellant's counsel first argued that Jimmy Hooper, Appellant's nephew, misidentified him as the attacker because of the low lighting in Jimmy's bedroom (T 1975, 1976). Counsel had previously cross-examined Jimmy on this issue. Then he told the jury that someone else committed the crimes and, in fact, allegedly hit Appellant on the head when Appellant entered the apartment (T 1978). Appellant later testified in this regard (T 2108). Counsel went so far as to argue and later enter into evidence an artist's rendition of the mystery man which allegedly substantiated Appellant's theory (T 1977, 1978). Further he argued that Appellant's brother James Hooper, had a motive to commit the murders. Finally, that James Hooper had lied on his driver's log leaving a three and a half hour span of time in which he inferred Hooper could have gone to the apartment and killed his own wife and child (T 1982). At no time did Appellant's counsel say, infer or otherwise indicate that one of the theories of the defense was voluntary intoxication. The only reference in counsel's opening statement to even the possibility of Appellant drinking much less being intoxicated to the point it was an issue was the following aside:

> Mr. Rivenbark left and came back, and the evidence will show the early morning of August 20th, Harold was supposed to pick George Rivenbark up. This troubled Harold, I believe the evidence will show, has already shown, because it bothered him. Harold started drinking, something he does not normally do.

(T 1976, 1977).

Only at the subsequent charge conferences did Appellant argue he was entitled to the intoxication instruction (T 2427-2429, 2515-2517). He did not rely on the fact intoxication was a theory of the defense but rather that the State's theory indicated he was entitled to it (T 2429, 2515). The defendant, of course, must control his own defense. Moreover, Appellant's closing argument is blatantly void of even one reference to a possible theory of intoxication as a defense (T 2429-2478). In fact, Appellant attempted to negate any possibility that intoxication was an issue as evidenced at pages 2476-2477 of the trial transcript when he argued:

> The State argued, ladies and gentlemen, that Harold Hooper was very drunk, and he came in there and for Lord knows why, got into with Kathy and then tried to shut up the other two. Jimmy testified, ladies and gentlemen, if you'll remember, that when this person came into the room, which he said was Harold, on either of the three occasions that he never smelled any alcohol. If Harold Hooper had drank as much that he says he drank, you should have smelled it as soon as he came in the house. (Emphasis supplied)

It is abundantly clear Appellant did not consider voluntary intoxication as a theory of his defense. Since Appellant is entitled to an instruction which supports his theory of defense not the State's theory of prosecution the court properly denied the requested instruction.

It is interesting to note that appellate counsel also recognized that Appellant's theory of defense was that someone else committed the murders rather than voluntary intoxication (making this argument in this issue inconsistent with the issue raised later in Appellant's brief). (Appellant's Brief at 49).

Counsel does not complain Appellant was forestalled from presenting a defense of intoxication rather the complaint seems to be Appellant was restricted in presenting his defense that somebody else committed the murders (possibly James Hooper, Appellant's brother, or the "maintenance man").

Appellant's substantial reliance on Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981) as well as the other cases which purport to hold if there is any evidence of intoxication the jury should be instructed in that regard is misplaced and not a correct statement of the law. What the case does say is that an accused is entitled to an instruction on voluntary intoxication when there is some evidence of intoxication and the theory of the defense is intoxication or some defense consistent with intoxication. See Laythe v. State, supra; Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983); Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979); Frazee v. State, 320 So.2d 462 (Fla. 3d DCA 1975).

Appellee asserts that Mellins as well as the other cited cases stand for the proposition that when an accused relies on a theory of defense or alternative theories of defense which are consistent then and only then is he entitled to a jury instruction where there is some evidence to support his theory or theories. Unfortunately for Appellant, Mellins supports rather than contravenes Appellee's position in the case at bar. In order to more fully understand this reasoning a discussion of Mellins, the actual facts, its holding, and the testimony of Cassandra Mellins

is warranted.[3]

Cassandra Mellins had been the victim of a battery. When the police arrived her attacker had retreated and she expressed a desire not to prosecute. Upon the person returning to the scene, however, she became loud and obscene. Mellins was eventually arrested for disorderly intoxication and subsequently charged with battery on a law enforcement officer. She was only tried on the battery charge. The police officer testified he arrested her due to her intoxication and her obscene abusive language. While arresting her she struggled but was not charged with resisting arrest. She kicked the officer which resulted in the felony battery charge. Her theories of defense were self-defense based on an unlawful arrest and in the alternative voluntary intoxication to negate the requisite specific intent in the event the arrest was found to be lawful. On the facts of the case these defenses were not inconsistent. Mellins took the witness stand and testified, (1) that while she admitted kicking the police officer she did so in self-defense only after he hurt her in applying the handcuffs (MT 70-71), and (2) that she was not intoxicated (MT 69).[4] Because Mellins was not convicted of disorderly

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3 See Appellee's Motion to take Judicial Notice of Cassandra Mellins trial testimony and attached transcript. Reference to the transcript will be by the smybol "MT" followed by the appropriate page number.

4 Appellate counsel's speculation in footnote 16 at page 28 of his initial brief is not only wrong and not supported by the record, it is absurd. Mellins was charged with battery. Though Mellins was arrested for disorderly intoxication she was never prosecuted for that charge.

intoxication, the prosecution had to prove the police officers were acting within the lawful performance of their duties, an essential element of the crime of battery on a law enforcement officer. §784.07, Florida Statutes. The prosecution also had to prove Mellins was violent when she was arrested which would foreclose Mellins' theory of self-defense because one cannot resist an arrest, even if unlawful, with violence. State v. Johnson, 382 So.2d 866 (Fla. 2d DCA 1980); Meeks v. State, 369 So.2d 109 (Fla. 1st DCA 1979). The charge of battery on a law enforcement officer is a specific intent crime, Fouts v. State, supra, and voluntary intoxication is a defense. Russell v. State, 373 So.2d 97 (Fla. 2d DCA 1979). It is clear from the facts in Mellins that the alternative defenses of self-defense (admission she kicked the officer but only in her defense), and intoxication (to negate the specific intent) are consistent and the Fourth District Court of Appeal was correct in reversing due to the trial court's refusal to give the voluntary intoxication instruction. The trial court improperly considered the opinion testimony of Mellins as an estoppel to the intoxication defense. This was error due to the principle stated by the District Court of Appeal that one is entitled to an instruction on his theory of defense if there is some evidence to support it. Mellins at 1209; Laythe, supra. Notwithstanding Mellins' testimony, the evidence at trial supporting her voluntary intoxication defense came from the police officer. As the District Court properly pointed out, if Mellins had denied drinking then she could not have relied on the defense of voluntary intoxication. Mellins at 1210. A denial

she had been drinking at all would have been contradictory and inconsistent with her theory of defense foreclosing a reliance on voluntary intoxication. The rule enunciated in Stripling v. State, supra, that "inconsistencies in defenses in criminal cases are allowable so long as the proof of one does not necessarily disprove the other" was therefore inapplicable in Mellins as opposed to the case sub judice. What distinguishes the instant case from Mellins is that the defense of voluntary intoxication is necessarily inconsistent with the theory of defense advanced by Appellant in which he denies committing the murders and asserts someone else did it. The proof of one necessarily disproves the other. Wherein in Mellins, the voluntary intoxication theory was consistent with the self-defense theory in that proving one did not disprove the other.

Accordingly, a defendant will be entitled to a relevant instruction on alternative, consistent theories of defense when he admits committing the specified criminal acts leading to the charge and when the evidence supports the theory that he was (1) insane Evans v. State, 140 So.2d 348 (Fla. 2d DCA 1962), (2) entrapped, Ivory v. State, 173 So.2d 759 (Fla. 3d DCA 1965), cert. denied, 183 So.2d 212 (Fla. 1965); Pearson v. State, 221 So.2d 760 (Fla. 2nd DCA 1968); Stiglitz v. State, 270 So.2d 410 (Fla. 2d DCA 1977), (3) coerced, Koontz v. State, 204 So.2d 224 (Fla. 2d DCA 1967); (4) justified, Stinson v. State, 245 So.2d 688 (Fla. 1st DCA 1971); Whitehead v. State, 245 So.2d 94 (Fla. 2d DCA 1971), or (5) intoxicated to the extent of not being able to form the requisite specific intent, Fouts v. State, supra; Edwards v. State, supra;

Frazee v. State, supra. See also Robles v. State, 210 So.2d 441 (Fla. 1968), (no instruction on self-defense required where defendant denies committing homicide) and Hopson v. State, 168 So. 2d 810 (1936), (self-defense instruction reversible error where defendant's theory was accident).

Given the fact Appellant's theory of defense was that someone else committed the murders and the incredible detail with which Appellant related the events which allegedly took place during the time of his supposed intoxication, Appellant can hardly complain the ruling of the trial court was of such a prejudicial nature that it requires reversal. Appellee submits that based on the facts and circumstances of the case at bar it was not error to deny the requested instruction. There has been no showing of actual prejudice and a judgment will not be reversed unless the error was prejudicial to the substantial rights of the Appellant. Palmes v. State, supra; Padgett v. State, 84 Fla. 590, 94 So. 865 (1922); Kirby v. State, 44 Fla. 81, 32 So. 836 (1902). This long established decisional rule has also been enacted as a statute. §924.33, Florida Statutes (1977). Cf. United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1981), rehearing denied, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982), (no prejudicial error shown where a clearly erroneous instruction of federal constitutional magnitude shifted the burden of proof as to malice because the defendant's theory of defense was that he did not commit the crime).

Even if this Honorable Court finds the trial judge erred in failing to give Appellant's requested jury instruction on voluntary intoxication, Appellee submits any error by the failure

to give said instruction was "harmless error" beyond a reasonable doubt. Because of the facts and circumstances of the instant case, the evidence was so overwhelming that no rational jury could have reached a different result. See Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). While a defendant is entitled to a fair trial he is not entitled to a perfect one, Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) citing Lutwak v. United States, 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953), and where the independent evidence is so overwhelming, even constitutional error can be rendered harmless. Palmes v. State, supra; Sullivan v. State, 303 So.2d 632 (1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220, rehearing denied, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154. Appellee submits that while the jury may have found Appellant had been drinking on the night in question prior to finding the murders, the failure of the judge to give the requested jury instruction on voluntary intoxication was harmless in light of the overwhelming evidence against Appellant and by the fact he was not relying on intoxication as a theory of defense. This Court stated the principle relied on in another way over three decades ago in Kelly v. State, 199 So. 764 (Fla. 1941). Citing Hopkins v. State, 52 Fla. 39, 42 So. 52, 53, the Court said:

> Alleged errors in giving or refusing charges or instructions, and in the admission or rejection of testimony, which do not weaken the effect of the admitted testimony, and which do not reach the legality of the trial itself, will not be considered grounds for reversal where the evidence leaves no room for reasonable doubt of the defendant's guilt. (Citations omitted).

Although, in a capital case, the Supreme Court will carefully scrutinize any error before determining it to be harmless, Pait v. State, 112 So.2d 380 (Fla. 1959), it will not presume there is prejudice. Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1975), rehearing denied, 444 U.S. 975, 100 S.Ct. 474, 62 L.Ed.2d 393 (1978). The alleged error if found to exist, in any event, was not of such a constitutional magnitude to shift the burden of showing the error was harmless to the State. Appellant bears the burden and must show he did not receive a fair trial because of the court's alleged error. Harrell v. State, 405 So.2d 480 (Fla. 3d DCA 1981); United States v. Frady, supra. Certainly, if an erroneous jury instruction was not prejudicial to a defendant where he denied committing the crime and the instruction acted to shift the burden of proof, Frady, supra, there is no error where, as in the case sub judice, defendant denied committing the crime and a requested instruction was not given at all because it was irrelevant to the defendant's theory of defense.

Based on the foregoing, the judgment and sentence should be affirmed as to this issue.

ISSUE V

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S ALLEGED "GOLDEN RULE" ARGUMENT MADE DURING THE REBUTTAL PORTION OF CLOSING ARGUMENT.

Appellant contends the following statement made by the State in the rebuttal portion of closing argument was improper because it was a "golden rule" argument:

> Mr. Baker then goes on to point out, he (James Hooper) said he walks into the apartment by himself. That's not consistent because Ms. Lewis -- or Mrs. Pruitt says Ms. Lewis walked in there with him. Ladies and gentlemen, if you walked up and the first thing you saw was your wife stabbed seven times, both jugulars cut, how much attention can you be paying as to who's entering the apartment with you? (Emphasis supplied)

He further contends the trial judge erred in overruling the objection and denying his motion for mistrial. This issue is easily disposed with.

Appellee submits that the prosecutor's comment was not a "golden rule" argument but rather a fair comment on the evidence which was invited by defense counsel's attempt to impeach James Hooper's trial testimony. In his closing argument defense counsel argued:

> Ladies and gentlemen, let's examine James Hooper. Ladies and gentlmen, I was not there. I don't know if James Hooper was there. I don't know if James Hooper had anything to do with this murder -- these murders, but consider the following ideas: While he's up in Ohio making funeral arrangements for his dead wife and adopted daughter, he starts sleeping with Mr. Harold Hooper's ex-wife. That shows the depth of his grief . . . .

> Ladies and gentlemen, the Court's going to instruct you as to some factors to rely on when you determine the credibility of the witnesses. He'll tell you -- you are going to hear some of the factors: Did the witness seem to have the opportunity to see and know the things about which the witness testified? . . . Did the witness seem to have an accurate memory? . . .
>
> Ladies and gentlemen, consider all witnesses. Consider why Jan Pruitt had to lie about seeing Marsha Lewis go in with James Hooper . . . . (Emphasis supplied)

(T 2463, 2471, 2475). The prosecution statement precipitated by defense counsel's attack on the credibility of James Hooper was not calculated to appeal to the sympathy of the jury or to have the jury abandon the "cold neutrality expected of them." Rather, it was a comment which came on the heel of defense counsel's closing argument and which was directed to matters in evidence. As long as the remarks are accurate and supported by the evidence or based on a reasonable inference therefrom, the fact the remark was florid or dramatic will not render it improper. Collins v. State, 180 So.2d 340 (Fla. 1965). Furthermore, the error complained of falls within the holding of Henderson v. State, 94 Fla. 318, 113 So. 689 (1924) wherein it was held that counsel for the defendant cannot provoke comments from a party or witness and then claim error.

Appellant cites Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 103 S.Ct. 184, rehearing denied, 103 S.Ct. 482 (1982), in arguing the prosecution's statement exceeded the bounds of legitimate argument which in another case may have been acceptable. (Appellant's Brief at 41). Appellee submits the prosecutor's

remark in the case at bar was a logical inference from which the jury could draw from the evidence and its common sense and perfectly acceptable under the circumstances. This Court in Breedlove at 413 So.2d 8 said:

> Wide lattitude is permitted in arguing to a jury . . . Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments . . . The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown . . . Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks . . . (Citations omitted)

The Court went on to say:

> The judge refused to grant a mistrial, finding the state's argument not prejudicial due to the context in which the objected to remarks were made. Some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required. (Emphasis supplied) [5]

The prosecutor in the instant case was only asking the jurors to draw on their common sense in understanding why, under the circumstances, James Hooper's testimony may have been inconsistent. The remark was provoked by defense counsel's argument and was a reference to a normal reaction for a husband who had just found his wife brutally murdered. Compare with Robles v. State, 210 So.2d 441 (Fla. 1968). Appellant, or any defendant, who commits so horrible a crime can hardly expect, under the circumstances, for James Hooper, or any witness, to be a model of calmness, a sponge capable of soaking up all of the goings on around him while viewing his wife's lifeless form before him and then have the wherewithall and presence of mind to later regurgitate every single detail exactly as taken in. This is the

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[5] Morriss v. State, ___ So.2d ___ (Fla. 3d DCA 1984), 9 F.L.W. 1239, opinion filed June 15, 1984.

thrust of the prosecutor's remark--a comment on the evidence and a logical inference therefrom already before the jury. It was not intended to arouse sympathy and based on the facts of this case certainly did not "influence the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977).

Therefore, the trial judge properly overruled the Appellant's objection and motion for mistrial. The remark was not so prejudicial as to require reversal because of the context in which it was made. The judgment and sentence should be affirmed.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN SUSTAINING THE PROSECUTION'S OBJECTIONS TO APPELLANT'S EFFORTS TO ATTACK JIMMY HOOPER'S CHARACTER BY REPUTATION FOR TRUTH AND VERACITY.

Initially, Appellee submits that Appellant has once again attempted to improperly bring an issue before the Court on Sixth and Fourteenth Amendment grounds. (Appellant's Brief at 43). These legal grounds were not raised in the court below and should not be addressed on appeal. Steinhorst v. State, supra. Moreover, defense counsel did not object at all when the trial court sustained the prosecution's objection to Appellant's attempts at attacking the character of Jimmy Hooper (T 2037-2038). Knowing that the prosecution had previously filed a Motion in Limine on this subject (T 2035) and that the evidence sought was probably not admissible (T 2036), defense counsel chose to move on to other areas rather than attempt to lay a proper foundation (T 2038) or proffer the testimony of the witness.

It is the long established law in this jurisdiction that if a court sustains an objection excluding certain evidence or testimony the proponent must make a proffer of the evidence or testimony in order that an appellate court can determine whether reversal is necessary or the exclusion was merely harmless. The rule is found in Boykin v. State, 40 Fla. 484, 24 So. 141 (1898):

> It is the duty of a party appealing to an appellate court to make the errors apparent of which he complains; and where, in the examination of witnesses on the trial, any of his questions have been excluded on objection, and such questions do not in

> and of themselves indicate whether the answers thereto will be material or pertinent evidence or not, it is his duty, in order to have the rulings thereon reviewed on appeal, to make an offer at the trial of what he proposes to elicit or prove by such questions, so that both the trial and appellate court can determine whether the proposed evidence is material or not; otherwise, he fails to make his alleged error to appear, and the appellate court will so declar.
> (Emphasis supplied) (Citations omitted)

While it is clear Appellant was attempting to impeach the character of Jimmy Hooper by use of reputation testimony of Jan Pruitt (T 2030-2043), what is not clear from the record is how Appellant proposed to accomplish it.

The prosecutor anticipating a defense attempt to impeach Jimmy Hooper filed a Motion in Limine (R 3151, T 2035). Said motion was based on depositions which involved individual acts as opposed to the reputation of Jimmy Hooper (T 2035). While defense counsel indicated he wished to make a proffer outside of the presence of the jury, he did not object when the court ruled the questions could be asked in front of the jury (T 2036). The following colloquy then took place:

> MR. BAKER:
> Q: Ms. Pruitt did you know Jimmy Hooper?
>
> A: Yes.
>
> Q: Did you have occasion to talk with other people in the Marsh Cove community about Jimmy Hooper?
>
> A: Several times.
>
> Q: Did you become aware of his reputation in the community for truth and veracity?
>
> A: Yes.

MR. BURGESS:
Your Honor, I object. I don't think that is proper on reputation.

THE COURT:
Sustain the objection.

MR. BAKER:
Q: Ms. Pruitt, did the people you talked to, did any of them know Jimmy Hooper or indicate they had known Jimmy Hooper?

A: Yes they did.

Q. Did they express an opinion to you as to his reputation for truth and veracity in the community?

THE COURT:
Just a moment. Do you have an objection?

MR. BURGESS:
Yes, Your Honor, I have.

THE COURT:
The same ruling. I sustain it . . .

MR. BAKER:
Q: Ms. Pruitt, were you aware of his reputation in the community?

A: Yes.

Q: How were you aware of his reputation?

THE COURT:
If there is an objection I will sustain it.

MR. BURGESS:
I don't think we actually got that far. I still have the same objection.

MR. BAKER:
Your Honor, perhaps I could just move on.

(Emphasis supplied). Defense counsel did not thereafter request the court to proffer what the testimony of the witness would have been had he been allowed to ask further. He opted to move on without objection. Counsel's failure to object in light of the Motion in Limine falls squarely within the rule of law established in Boykin, supra.

Under the facts and circumstances of this case there is no support for Appellant's contention the cause should be reversed on this issue. It was incumbent upon defense counsel to raise a timely objection to the court's sustaining of the prosecution's objection to allow the trial court an opportunity to specifically rule on the issue. Appellant's deference to the court's rulings without objection and without proffer of the testimony makes it impossible for an appellate court to "determine whether the proposed evidence is material or not." Boykin, supra.

Recognizing that appellate courts cannot find reversible error in cases as the one sub judice this Court has stated a simple rule: "Reversible error cannot be predicated on conjecture", Singer v. State, 109 So.2d 7 (Fla. 1959); See Sullivan v. State, 303 So.2d 632 (Fla. 1974). Stated another way in the recent capital case of Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979), this Court said: "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." While the latter case involved a discovery violation the principle of law is equally applicable to the case at bar.

Even if this Honorable Court finds the trial court erred in sustaining the prosecutor's objections, Appellee submits such error was harmless beyond a reasonable doubt. While Appellant is entitled to a fair trial he is not entitled to a perfect one. Bruton v. United States, supra; Lutwak v. United States, supra. Of course, this Court will carefully scrutinize any alleged error

before determining it to be harmless. Pait v. State, supra. However, it should not presume prejudice. Salvatore v. State, supra.

Appellee submits that Appellant's inability to impeach Jimmy Hooper by the testimony of Jan Pruitt would have been cumulative and therefore it was harmless to have been excluded. Appellant called another witness, George Charles Delmar, Jr., in an attempt to impeach Jimmy Hooper (T 2043-2053). Obviously, the jury chose to believe Jimmy Hooper when it returned with verdicts of guilty. However, even more compelling is the fact Appellant had a full and fair cross-examination of Jimmy Hooper thereby allowing the jury to hear and observe his testimony and thereafter determine his credibility based on the instructions given by the court (T 1432-1471).

Based on the foregoing Appellee asserts the court did not err beyond a reasonable doubt and Appellant has failed to demonstrate reversible error as to this issue.

ISSUE VII

THE TRIAL COURT DID NOT RESTRICT OR PREVENT APPELLANT FROM PRESENTING A DEFENSE.

Appellant has again couched his argument in terms of Sixth and Fourteenth Amendment violations when these grounds were not raised in the trial court below. See Steinhorst, supra. Appellee will nonetheless address the issue raised by Appellant in the event this Court intends to rule on the merits.

Appellant asserts the trial court restricted or prevented him "from presenting evidence to the jury in support of his defenses

that either Jimmy Hooper misidentified him or James Hooper had a motive and opportunity to commit the murders." (Appellant's Brief at 47). The issue raised by Appellant in these regards is completely meritless.

First, Appellee submits that Appellant took advantage of every opportunity available to him in an effort to raise a reasonable doubt to the jury concerning Jimmy Hooper's identification of Appellant as his attacker. Not only did Appellant successfully question Jimmy Hooper's memory of the night in question but he called another witness (George Charles Delmar, Jr.) to impeach Jimmy Hooper's positive identification (T 1432-1472, 2043-2044). Appellant's point as to Jimmy Hooper is therefore groundless because he had a fair and full cross-examination relative to the events he witnessed. See Coco v. State, 62 So.2d 892 (Fla. 1953). (Appellant's argument that excluding Dr. Brigham's testimony prevented him from presenting a defense is discussed subsequently in Issue VIII).

As to Appellant's second contention that the trial court limited him from developing a defense that James Hooper had a motive and opportunity to commit the murders, Appellee submits the record reflects otherwise. In any event, the case law cited by Appellant clearly indicates this issue too is without merit.

The prosecution, in anticipating an attack on the credibility of James Hooper, presented substantial evidence as to the whereabouts of Hooper during the commission of the murders. Not only did James Hooper testify on direct examination as to his whereabouts and his activity on the fateful night, (T 1624-1645), but Appellant

questioned him exhaustively during cross-examination on the subject (T 1645-1673, 1677-1679). At one point, Appellant was able to get James Hooper to admit he had "doctored" his driving log (T 1678-1679). The times were relevant to the times the murders may have been committed. However, what dooms Appellant's argument in this regard is that his defense at trial was that someone other than he (possibly the maintenance man) committed the murders not that James Hooper did. Defense counsel went so far as to argue to the jury that in fact he was "not saying that James Hooper committed these crimes" (T 2467). All of these factors combined do not point to a possible defense for Appellant but only that James Hooper had an opportunity and possibly a motive. In addition, the law on this point indicates an accused is precluded from showing a mere inference that another party may have had a motive or opportunity absent a direct link to said other party.

The applicable law was established well over 65 years ago in Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915). In stating the rule of law that it is no defense for one charged with a crime to show merely that another person possessed the means or opportunity to commit the crime, this Court said at 68 So. 934:

> It is undoubtedly true that one accused of a crime may show his innocence by proof of the guilt of another, but to show that a third person merely had the means or opportunity at hand to commit the crime is not sufficient to "lead the guarded discretion of a reasonable and just man" to a belief in the existence of the third person's guilt. (Citation omitted)

While it is true that an accused can present evidence tending to show that some person other than he committed the crime, the rule

stated in Lindsay indicates there must be a direct link to that party or the evidence is speculative and not admissible. This is so because "[S]uch evidence is irrelevant and can afford no safe guide to a jury." The same can be said on the peculiar facts of the instant case. Such evidence is "too remote and indefinite" when, as in the case at bar, the defense suggested is that another person committed the crime. Id. at p. 934. It is even more compelling in the case sub judice where Appellant himself testified he saw another person not his brother at the crime scene. Based on this defense, the evidence becomes doubly speculative and irrelevant.

Appellee agrees with Appellant the evidence which was proffered at trial and cited at page 50 of his initial brief "does not directly exonerate" Appellant. Appellee submits there is no evidence, directly or indirectly, which exonerates Appellant (T 1649-1656). Appellee asserts the evidence was properly excluded as being speculative and irrelevant to Appellant's cause (T 1653-1656). There can be no relevancy in this situation where the evidence only raises a possibility that James Hooper had an opportunity to commit the murders when the defense is that yet another person other than James Hooper or Appellant committed the murders. See Lindsay, supra.

The trial court did not restrict or prevent Appellant from presenting a defense and the exclusion of the irrelevant, proffered evidence was proper. The judgment and sentence should be affirmed on this issue.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF EXPERT EYEWITNESS TESTIMONY.

Appellant requests this Court recede from its recent decision in Johnson v. State, 438 So.2d 774 (Fla. 1983). Appellee finds (and as Appellant correctly points out) this Honorable Court has specifically rejected the issue now raised by Appellant in the instant case. Not only has this Court rejected Appellant's assertion, several other courts have reached the same conclusion about expert testimony in eyewitness identifications. Johnson v. State, supra at 777, footnote 2.

Due to the very recent vintage of the Court's finding in Johnson, supra, Appellee finds it unnecessary to belabor this point further. Appellee submits Johnson is still applicable and the Court should deny Appellant's invitation to recede from its previous holding. The trial court's exclusion of the expert testimony should be affirmed.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN ADMITTING APPELLANT'S STATEMENT THAT HE WAS NOT GOING BACK TO THE PENITENTIARY.

Appellant contends his statement made six days after the Florida murders were committed and during an attempted suicide when Ohio authorities were arresting him for said murders was inadmissible as (1) an excited utterance and (2) as a reflection on his character. Appellant asserts the trial court erred by admitting the statement during trial.

Appellee submits the statement was relevant and, therefore, admissible under at least two theories; (1) the statement was evidence of guilty knowledge; and (2) the statement was an admission and admissible pursuant to §90.803(18)(a), Fla. Stat. (1981).

An Ohio police officer testified during trial that Appellant made certain statements to him while being taken into custody in Cincinnati, Ohio (T 1931-1961). The only statement relevant to this issue was made during Appellant's attempt to escape or commit suicide by jumping from the roof of the Salvation Army Center. The officer testified that during the negotiations with Appellant his only role was to act as negotiator and he neither knew why Appellant was being taken into custody nor did he ask any questions (T 1950-1951). During his conversation with Appellant the officer testified that, among other things, Appellant said, "I don't want to go back to jail. I'll die before I go back to the penitentiary." (T 1951). On proffer, defense counsel objected on grounds of relevancy in that the attempted suicide had nothing to do with Appellant fleeing from the scene of the crime or to show a state

of mind of guilt (T 1941). The trial judge overruled the objection indicating he viewed the statement as an "excited utterance not made in custody" and admissible to show "state of mind with regard to the departure from the State of Florida." (T 1941-1942)

Appellant has seized upon the trial court's label of the statement as an "excited utterance" and claims it should have been excluded because it was not made "under such severe stress or shock that his reflective capacity was suspended" even though Appellant was in the process of attempting suicide. Also, that the statement was not spontaneous in relation to when the crimes were committed. Appellee submits Appellant's argument on this issue is pure semantics. While the judge used the term "excited utterance" it is obvious by the explanation accompanying his ruling he found it relevant to Appellant's consciousness of guilt and state of mind and it was therefore admissible.

Moreover, "[a]ll relevant evidence is admissible, except as provided by law," §90.402, Fla. Stat. (1981), and an appellate court will sustain the lower court's ruling if there is any theory on which the court's action could be based--even if the stated reason for the ruling was erroneous. Stuart v. State, 360 So.2d 406 (Fla. 1978). Even more compelling, this Court recently affirmed the notion that an appellate court should not tamper with a trial judge's determination of admissibility absent an obvious showing of error. Jones v. State, supra; Buchman v. Seaboard Coast Line, 381 So.2d 229, 230 (Fla. 1980).

This Court has consistently held and affirmed the concept of law that "all relevant evidence having probative value is

admissible save to attack character even though it would have a tendency to suggest the commission of a separate crime." Jones v. State, 440 So.2d 570, 576 (Fla. 1983) citing Williams v. State, 110 So.2d 654, 660 (Fla. 1959); see also Straight v. State, 397 So. 2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Ashley v. State, 265 So.2d 685 (Fla. 1972). While Appellant's statement may have suggested involvement in another crime it was nevertheless admissible as going to consciousness of guilt by his act of flight from Florida and from the Ohio authorities. Cortes v. State, 185 So.2d 323 (Fla. 1938). Furthermore, the jury could reasonably have concluded his actions and statement evidenced Appellant's guilty knowledge. See Parrish v. State, 90 Fla. 25, 105 So. 130 (1925); Darty v. State, 161 So.2d 864 (Fla. 2d DCA 1964), cert. denied, 168 So.2d 147 (Fla. 1964); Hall v. State, 381 So.2d 683 (Fla. 1978). The fact the jury could possibly reach a contrary determination does not negate the relevance of the evidence to prove Appellant's guilt. Hall, supra. It should be noted that although defense counsel originally objected to the statement as showing prior bad acts (T 1941), when the trial judge explained why he was going to allow the evidence, counsel acquiesced to the ruling (T 1942).

Appellee suggests there is yet another reason the statement was admissible. Section 90.803(18)(a), Fla. Stat. (1981), a recognized exception to the hearsay rule, reads:

> ADMISSIONS.--A statement that is offered against a party and is;
> (a) His own statement in either an individual or a representative capacity;

Since the statement was relevant, it was deemed admissible unless excluded by some specific rule of law. Section 90.402, supra. There being no rule to exclude the statement as inadmissible, the statement was properly admitted.[6]

There being no obvious showing the trial erred in admitting Appellant's statement this Court should not disturb the lower court's decision.

ISSUE X

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON INTOXICATION AT PENALTY PHASE OF THE PROCEEDINGS.

Appellant contends his requested jury instruction on intoxication at the penalty phase should have been given and it was error for the trial court to deny his request. Appellant's proposed instruction reads as follows:

> The degree of defendant's intoxication at the time of the offense is a mitigating factor to be considered by the jury in making recommendation to the court. (sic)

(T 2668-2669).

At the outset it should be noted that at no time has Appellant objected to the standard jury instructions in mitigation

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[6] For yet another possible reason to admit the statement see §90.803(3), Fla. Stat. (1981), --Hearsay Exceptions;
(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.--
(a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
(1) Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
(2) Prove or explain acts of subsequent conduct of the declarant.

being given. In fact, Appellant gave specific notice he was going to "specifically abandon" the mitigating circumstances set out in the standard jury instructions at page 80 and numbered one (1) and three (3) respectively. They are, 1. (Defendant) has no significant history of prior criminal activity; and 3. The victim was a participant in the defendant's conduct or consented to the act (T 2666). While Appellant asked for the remaining mitigating instructions the trial court found that numbers 4, 5 and 7 were inapplicable to the facts and denied giving them (T 2667).[7] Thereafter, the court indicated it would give the instruction on mitigating factors numbered 2, 6 and 8. Appellant asked the court to consider giving his proposed instruction as set out above. (T 2668-2669). The trial court denied the proposed instruction but allowed Appellant "free rein to argue that under either figure 2 or figure 6, Mitigating Circumstances" (T 2669).

Appellee submits the trial court did not err in denying the proposed instruction. The trial court gave the Florida Standard Jury Instructions in this case in the penalty phase (T 2709-2716). This Court has repeatedly held that since the instructions track the language of the statute, they do not limit the sentencer's consideration of non-enumerated mitigating circumstances. Francois v. State, 423 So.2d 357 (Fla. 1982); Straight v. Wainwright, 442 So.2d 827 (Fla. 1982) and Peek v. State, 395 So.2d 492 (Fla. 1981). Furthermore, the death penalty statute has been constitutionally

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4. The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;
5. The defendant acted under extreme duress or under the substantial domination of another person.
7. The age of the defendant at the time of the crime.

upheld. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976).

Notwithstanding the denial of Appellant's proposed jury instruction, trial counsel nevertheless was given free rein to argue Hooper's intoxication as a possible mitigating factor--and he did so (T 2700-2702). The proposed instruction would have done nothing to explain the standard instruction and may have confused the jury if it had been given. The trial court noting there was some evidence of Appellant drinking allowed trial counsel to argue intoxication as a non-enumerated statutory mitigating factor. The jury, therefore, had at its disposal and as a guide all of the information necessary to exercise its discretion to reach an informed, constitutional decision. As the United States Supreme Court recently said: "We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way." Barclay v. Florida, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1134 (1983); Proffitt, supra.

Not only did the jury have the necessary information before it with which Appellant now claims was not adequate absent his proposed instruction, but the trial court considered at length the Appellant's alleged intoxication in imposing sentence (R 3417, 3421). Moreover, although the trial judge found no statutory mitigating circumstances existed he found three (3) nonstatutory, non-enumerated mitigating factors existed (R 3423).

Inasmuch as Appellant was allowed to argue intoxication as a mitigating factor even though the proposed instruction was denied; was allowed to argue on behalf of mercy; and the sentencer

was not precluded from considering such evidence, there is no basis to support the claim the denial of the proposed instruction violated Lockett v. Ohio, 438 U.S. 586 (1978). See Spinkellink v. Wainwright, supra; and Ford v. Strickland, 606 F.2d at 812-813, distinguishing Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981) a case relied upon by Appellant. See also Booker v. Wainwright, 703 F.2d 1251, 1259 (11th Cir. 1983); Goode v. Wainwright, 704 F.2d 593, 601-602 (11th Cir. 1983); Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983).

Since Appellant has failed to show error on the issue presented the trial court's denial of the proposed instruction should be affirmed.

ISSUE XI

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER OF RHONDA HOOPER WAS COMMITTED FOR THE PURPOSE OF PREVENTING OR AVOIDING LAWFUL ARREST.

The trial judge found the State proved four (4) aggravating circumstances beyond a reasonable doubt as to Rhonda Hooper. The court also found no statutory mitigating factors but did, however, find three (3) nonstatutory mitigating factors (R 3431). Appellant contends the court erred in finding two (2) aggravating circumstances as to Rhonda Hooper: "2. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding arrest or effecting an escape from custody"; and "4. The murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R 3426-3428, 3430-3431)

(Argued subsequently in Issue XII). Appellee submits the trial court did not err and, in any event, one or more other aggravating circumstances existed which outweighed the mitigating factors thereby rendering the death sentence appropriate.

The trial court was convinced that Rhonda Hooper was murdered with the intent to avoid arrest and detention. In support of this conclusion, the trial judge cited Riley v. State, 366 So.2d 19, 22 (Fla. 1978), cert. denied, ___ U.S. ___, 103 S.Ct. 317, 74 L.Ed. 2d 294 (1982). Appellee submits the trial court was correct in finding this aggravating circumstance as set out in its written judgment and sentence. Furthermore, Appellee submits it is the only motive under the circumstances of this case for the murder of a nine-year old child by a person 6'-8" tall and weighing over 300 pounds.

In the event this Court does not find this aggravating circumstance exists, it is submitted the remaining three (3) aggravating circumstances are present and are each in themselves sufficient to support the death sentence. Therefore, a new sentencing trial is not mandated pursuant to Elledge v. State, 346 So.2d 998 (Fla. 1977) and the trial court's finding should be affirmed.

ISSUE XII

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER OF RHONDA HOOPER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT THE PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant claims the trial court erred in finding he committed the murder of Rhonda Hooper in a cold, calculated and premeditated manner without the pretense of moral or legal justification. Appellee submits the record indicates otherwise.

The trial court in delineating its reasons for finding this aggravating circumstance as to Rhonda Hooper wrote in the "Judgment and Sentence of Harold W. Hooper":

> FACT: Rhonda Kay Hooper was murdered by the deliberate act of the defendant in a cold, calculated manner. His choice of the weapon of her destruction, a ligature, exceeds the premeditations required to prove capital murder. Blood stains proved to have been only those of the defendant's were found on the ligature. It had to be formed, placed and tied upon the child's throat before the pressure required to take her life was applied. This murder was an execution.
>
> FACT: The defendant denied her murder and, consequently, no legal nor moral pretense nor justification was shown.
>
> FACT: No motive for the murder of Rhonda Kay Hooper was shown by the evidence.
>
> FACT: The child had loved him and they had gotten along exceptionally well, according to the defendant's testimony, which was corroborated by James Scott Hooper and others.
>
> CONCLUSION: There is an aggravating circumstance under this paragraph as to Rhonda Kay Hooper. Those facts constitute one of those cases which is the exception to the contract type murder referred to in McCray v. State, 416 So.2d 804, 807 (Fla. 1982) and Cannady v. State, 427 So.2d 723, 730 (Fla. 1983). The murder was an execution.

(R 3430-3431)

Appellee submits the trial court's conclusions were accurate and within the law. Not only did the court find the circumstance existed the court noted the "conclusion was arrived at by reasoned judgment and not by a mere counting process of the aggravating and mitigating circumstances. State v. Dixon, supra." The trial court applied the proper criteria in weighing the conflicting circumstances as required by State v. Dixon, 283 So.2d 1 (Fla. 1973), in which this Court found the death penalty statute constitutional.

Appellant's argument that there is no evidence Hooper planned or plotted the murder in a cold and calculated manner is groundless in light of this Court's ruling in Alvord v. State, 322 So.2d 533 (Fla. 1975). Alvord committed three murders by strangulation. Chief Justice Adkins writing for the Court said:

> It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great . . . . Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. This could only be accomplished through a cold, calculated design to kill, as distinguished by a single shot from a firearm during an outburst of anger. (Citations omitted) (Emphasis supplied).

322 So.2d at 540. This Court also distinguished a fatal knife wound with a shot from a firearm. Chief Justice Adkins in a specially concurring opinion in Thompson v. State, 328 So.2d 1 (Fla. 1976) wrote:

> There is a distinction between a defendant firing a pistol at his victim and plunging a knife into his body . . . . To plunge a knife nine inches into the deceased's body, not once, but twice, and then to plunge it into the back of the victim, required reflection and murderous calculation.

328 So.2d at 6. In addition to Rhonda Hooper being strangled her neck had been slashed.

Appellee asserts the trial court properly found the murder of Rhonda Hooper was committed in a cold, calculated and premeditated manner. In the event this Court does not affirm the court below, Appellee submits the remaining three aggravating circumstances found by the court nevertheless outweigh the non-statutory mitigating factors. See State v. Dixon, supra.

Accordingly, the sentence of death as a result of the murder of Rhonda Hooper should be affirmed.

CONCLUSION

Based on the facts and foregoing arguments, Appellant's judgment and sentence 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 furnished by hand to David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 12th day of July, 1984.

THOMAS H. BATEMAN, III

OF COUNSEL