IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 20 1984
CLERK, SUPREME COURT
By [signature]
Chief Deputy Clerk

JOEL DALE WRIGHT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 64,391

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVNETH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State accepts the Appellant's statement of the case and facts as generally accurate subject to the following areas of disagreement and additional pertinent facts and any procedural differences that may be set forth within the confines of this brief more particularly in the argument section.

According to the testimony of Earl Smith, the victim's brother, it was on Saturday, February 5, 1983, that he took her shopping, as was their usual practice on a Saturday, and then returned to her home around 1:00 p.m. (R 1585). This was not the last time the victim was seen alive. Smith testified that he last saw her alive on Saturday afternoon at five o'clock when she came to his house to get the correct time to set her mechanical clock (R 1603).

On Sunday, Smith would go over to the victim's house around eleven o'clock and take her shopping. On February 6, 1983 he went over to her house at 12:15 p.m. (R 1587). After several attempts to locate Smith on the premises and after knocking on the front door and receiving no response, Smith went back to the victim's house and found the kitchen and dining room window wide open (R 1588-1589). Smith stepped through the window and went inside through the dining room to the living room, then through the middle bedroom and front bedroom to the kitchen. All the doors to the house were locked (R 1590-1591). Not locating his sister, he unlocked the front door of her house and left (R 1596-1597). While in her house he had to walk on debris or litter scattered throughout the residence which was so deep in her bedroom it obscured the front of her bed (R 1597). Smith

then went back to his own house and worked on a chain saw while keeping an eye on her house. He went back to the victim's house once more but still did not discover her and returned to his own house again to work on his chain saw. Between two and three o'clock Clayton Stricland pawned a pocket knife to Smith for five dollars ($5.00). They assembled the chain saw together then Smith went to K-Mart and bought oil (R 1598). The victim had been stabbed with a pocketknife-like instrument which had not been recovered (R 822, 815-822). A pocketknife was examined by the forensic serologist but no blood staining was found on it (R 2002). Smith subsequently got a flash light and went back into the victim's house entering through the front door. The only light in the house shone from a bed lamp in her bedroom. The bed was against the wall. He shone the flash light between the wall and the bed and could see her leg. He grabbed the mattress and pulled it back and took hold of her ankle and found that it was cold. Her dress was pulled up above her waist and she had no clothing on under that and was in a bloody condition. (R 1599-1602). He then went back to his house and called the sheriff (R 1601).

Doctor William Latimar, the medical examiner, testified on cross-examination, that in his opinion the stabbing wounds were inflicted from an assailant standing in front of the victim and that the wounds were most likely inflicted by someone who was right-handed (R 1834). He further testified on redirect examination by the State that if the stab wounds were made by a person behind her, the wounds would have been at a different angle, but

the doctor did not rule out other possiblities (R 1848-1849). The Appellant's two sisters testified that he was left-handed (R 2477;2480). It was also established, however, that his right hand was not crippled and that he was perfectly capable of using it (R 2481). The medical examiner also testified that the best estimate of time of death was between 5:00 p.m. and 9:00 p.m. on February 5, 1983 (R 1853). However this estimate of the time of death was based on normal eating and sleeping habits (R 1849). Reflecting on the issue of whether her eating and sleeping habits were normal, was the testimony of Shirley Bowen who cleaned out the victim's house after her death (R 2304). Bowen found night-gowns and pajamas unopened in the bottom of debris, not in the bedroom where she was found (R 2305). The stove was not working and there was a hot plate on top of it (R 2306). The pantry was empty and the refrigerator had only yogurt and cheese, although there was quite a bit of canned food in the debris. The canned items included chicken broth, turnip greens and cat and dog food (R 2306). The victim did not know how to cook (R 2307). Eliminating the findings that the victim was not in sleeping clothes and there was no food in her stomach, and basing the time of death on the condition of rigor mortis which involved the whole body, it was determined that the death could have been between twelve to twenty-four hours prior to the autopsy (R 1826-1827).

The proffered testimony of Kathy Waters initially established that a person similar in appearance to the Appellant was walking on State Road 19 after mid-night the evening of the

murder (R 2613-2619, 2624, 2633-2636, 2654-2657). However this witness came back into court again and testified that it was not still her testimony that she did not know who the person was and she indicated that if it had been the Appellant she would have picked him up and taken him where he wanted to go because she does know him (R 2649).

The Appellant did observe to William Barkley prior to the murder that "it is getting about time for the old lady to die", which statement was viewed by the friend as a comment upon the elderly and frail condition of the victim (R 2380-2382). This witness also testified that the Appellant commented that there "would probably be money in the house between all the papers and stuff in the house." (R 2378).

POINT I

THE TRIAL COURT DID NOT RESTRICT THE APPELLANT'S RIGHT OF CROSS-EXAMINATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The right of the defense to cross-examine state witnesses is a constitutional right, not a privilege, that derives from the Sixth and Fourteenth Amendments to the United States Constitution and from Article I § 16 of the Florida Constitution. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed2d 597 (1980); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed 2d 923 (1965); Knight v. State, 97 So.2d 115 (Fla. 1957); Coco v. State, 62 So.2d 892 (Fla. 1953), cert. denied 349 U.S. 931, (1955) reh. den. 350 U.S. 855.

The scope of cross-examination includes, among many other things, the interest of the witness in the litigation, his motives, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts about which he has borne testimony and his power of discernment, memory, and description. Burns v. Freund, 49 So.2d 592 (Fla. 1950) Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters. Florida Evidence Code, F.S. § 90.612(2).

With these principles firmly in mind, the State

responds that the trial court did not unreasonably restrict Appellant's right of cross-examination.

PATHOLOGIST

Dr. William Latimar received the body of Lima Paige Smith at nine o'clock in the evening and performed an autopsy in the evening hours of February 6, 1983 or the morning hours of February 7, 1983 (R. 1814-1815).

In determining the time of death, the medical examiner looks to such criteria as the anatomical condition of the body, such as the degree of rigor mortis and food contents in the stomach, the personal habits of the deceased, and the manner in which the deceased is dressed (R. 1826-1827;1824). When Lima Paige Smith was found she was not garbed in sleeping attire, but was wearing a heavy housecoat with a dress underneath it and panty hose (R. 1827). Rigor mortis had fully set in and further examination revealed that there was no food in the stomach of the deceased (R. 1826-1827). Based on these findings alone, a "definite" conclusion as to the time of death was not possible (R 1822). However, based on the degree of rigor mortis the medical examiner was able to conclude that death could have occurred twelve to twenty-four hours before the autopsy (R 1826-1827).

If Smith had followed the societal norm in regard to eating habits and the wearing of sleeping apparel upon retiring for the evening, based on autopsy findings, the best guess as to when death would have occurred would have been the preceding evening before the body was found, as the findings would sug-

gest she was killed before she had a chance to go to bed and possibly before she had eaten dinner, as her stomach contained no food and she was not garbed in sleeping apparel (R 1826-1827; 1849). Other than anatomical findings, the medical examiner is concerned with the personal habits of the deceased in determining a time of death. The medical examiner did not possess information concerning the personal habits of the deceased at the time of the autopsy. (R. 1823-1824). He has since received additional information regarding the personal habits of Lima Paige Smith, but still had no knowledge of the time she usually ate dinner or what she wore to bed, so that the initial determination of the time of death was based on normal eating and sleeping habits (R. 1825-1827;1849).

The Appellant contends on cross-examination the court would not permit defense counsel to inquire of the pathologist concerning sources of information used to determine a new time of death unless the questions were predicated upon prior testimony adduced at trial.

The State would first point out that although the doctor received additional information regarding the personal habits of the victim, he still had no knowledge of what time she usually ate dinner or what she wore to bed (R. 1826-1827). Unless additional information was forthcoming, the anatomical finding of extensive rigor mortis would set an <u>outside limit</u> for the occurrence between twelve to twenty-four hours preceding the autopsy, and based on the lack of food contents in the stomach and the garb of the deceased, the <u>best estimate,</u> absent

information or knowledge of abnormal eating or sleeping habits, would be that death occurred between five to nine o'clock Saturday night (R. 1825-1827;1853). There was no evidence, one way or the other, whether she had normal eating or sleeping habits (R.1844). The State did not introduce through this witness information that would change the medical examiner's determination as to the time of death nor did the medical examiner specify a new time of death. The most that was brought out on direct examination was that additional information could change the medical examiner's best estimate as to the time of death. The State did not pursue on direct examination a line of inquiry calculated to show that additional relevant information had been received and the examiner's opinion of the time of death had changed.

On cross-examination defense counsel inquired of the medical examiner as to whether the information he had received would be comprised of the fact that she was last seen alive by her brother at 5:00 p.m. on Saturday (R 1837). Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witnesses. The court may, in its discretion, permit inquiry into additional matters. Florida Evidence Code. F.S. § 90.612(2). The State had not brought out on direct examination what any additonal information consisted of, nor did it introduce into evidence the medical examiner's report. The trial court at first disallowed such inquiry because it involved quoting from the report and touched on matters not in evidence. Defense counsel acknowledged that he was paraphrasing from the

report (R 1838). It was then determined that such fact actually was in evidence as the victim's brother had previously testified he last saw the victim alive Saturday afternoon at five o'clock (R 1603; 1838). The trial court then overruled the State's objection and did not restrict the Appellant's examination in this regard (R 1839). The fact that the defense did not further pursue this particular line of inquiry is not attributable to the State. A party may waive his right to cross-examine witnesses, and may not complain of a denial of his right to cross-examine, by the retirement of a witness prior to a full and complete cross-examination. Cf. Acree v. State, 153 Fla. 561, 15 So.2d 262 (1943). There was no need to pose the question again in any event, as the initial question served the intended purpose of recapitulating prior testimony.

The Appellant was allowed to establish the source of the doctor's opinion as to the time of death of the victim upon further cross-examination and such questioning still revealed ignorance as to the victim's normal eating and sleeping habits (R 1843-1844). It is clear that no new time of death was established on direct examination and proper cross-examination should have occurred when and if the state called the sources to testify as to the pertinent or peculiar habits of the victim. Such information was provided by the testimony of Shirley Bowen who was the niece of Lima Paige Smith and who cleaned out the Smith residence after the victim was found (R 2304). She found nightgowns and pajamas, unopened in the bottom of the debris and not in Smith's bedroom (R 2305). This testimony

raised the possibility Smith did not wear pajamas to bed at night. She further found the stove was not working and there was a hotplate on top of the stove (R2306-2307). The pantry was empty and the refrigerator contained only yogurt and cheese, although there was canned food in the debris (R2306). This strongly suggests abnormal eating habits. It is clear that Shirley Bowen was the source of information from which the jury could conclude that death occurred twelve to twenty-four hours prior to the autopsy. The Appellant does not complain of and the record does not reflect any unfair restriction in regard to cross-examination of this witness.

Moreover, the relevance of the matter inquired about on cross-examination and the subsequent prejudice to the defendant are not obvious upon review of the record and in such a case the cross-examiner must proffer the questions and answers and explain their relevance in order to obtain meaningful review or such matters are waived.

KENNETH GOODSON

On direct examination Kenneth Goodson testified that on February 5, 1983, Charles Westberry and Denise Easter came to his house around six o'clock or six-thirty and left around nine-thirty or ten o'clock that night (R1962). Goodson did not recall seeing the Appellant that evening, and more specifically stated that he could not be sure whether he saw the Appellant the night of February 5th into February 6th (R1963).

On cross-examination the defense inquired as to whether Goodson recalled seeing and being with the Appellant

sometime in early March. The State objected to the question on the basis that the direct examination pertained only to February 5th and 6th. Defense counsel contended that the door was open to find out more about this witness' relationship with the Appellant (R 1964). The trial court restricted questioning to the time frame set up in direct examination butstated that the witness was sworn and would be available later subject to recall (R1965).

The right of cross-examination of a witness is restricted to facts and circumstances connected with the matters brought out in his direct examination, and if the adverse party wishes to examine the witness as to other matters he must make the witness his own. McAden v. State, 155 Fl. 523, 21 So.2d 33 (1945) cert.denied, 326 U.S. 723, 66 S.Ct. 28, 90 L.Ed 429 (1945). Clearly the defense had the right to inquire into matters concerning the ability of this witness to observe, remember, or recount the matters about which he testified, more particularly the witness' ability to recognize the Appellant, but the question propounded was not calculated to elicit such testimony.

It should be noted that this was not a key state's witness and inquiry into the relationship of the Appellant and this witness was hardly crucial to the defense because the Appellant never claimed to be with Westberry and Easter that evening, but at a poker game and Goodson testified he could not be sure whether he saw the Appellant the night of February 5th into February 6th (R1963). The State did not argue in closing argument that this witness did not see the Appellant the

evening of the murder or did not remember seeing the Appellant or that it was in any way significant (R2707). Charles Westberry was fully cross-examined as to his whereabouts the evening of the murder (R2174).

Moreover, a proffer of answers sought was necessary as the question did not go to the competence of the witness and the relevance of the questions to a possible motive is unclear. Nelson v. State, 395 So.2d 176 (Fla. 1st DCA 1981); Brown v. State, 362 So.2d 437 (Fla. 4th DCA 1978). As such, meaningful review cannot be had and such matter should be regarded as waived.

WALTER PERKINS

On cross-examination of Detective Perkins, defense counsel elicited the fact that Detectives Perkins and Douglas went to the house of the Appellant's wife with an arrest warrant for the Appellant and Detective Perkins went to the front door and told the Appellant he just wanted him to come down to the sheriff's office to answer a few questions, without informing the Appellant that he had a warrant for his arrest and further told the Appellant when the session was over he would bring him back home. It was part of a plan to get the Appellant to accompany Detective Perkins voluntarily to the sheriff's office so there would be no problem in making an arrest at the residence (R2353-2356). After eliciting the above testimony, defense counsel went on to ask, "So in effect then, insofar as your policy is concerned as a police officer, the ends that you seek to gain justify whatever means you have to employ; is that correct?" An objection by the State was sustained. Contrary to Appellant's

assertions this did not constitute an impermissible restriction on the right of cross-examination. The Appellant does not have the right to have the jury observe the officer's demeanor in answering questions such as this, because it is, in essence, an editorial loosely clothed in the form of a question and whether the witness answers or not the message is conveyed to the jury that this is a police officer who will do anything to achieve his goals. The functions of cross-examination are to elicit testimony concerning the facts of the case and to test the credibility of the witness. A police officer's philosophical tenets tend neither to prove nor disprove any material fact in issue and are therefore totally irrelevant. Such questions can lead to no admissible testimony and serve the singular and improper purpose of making mini-closing arguments in mid-trial, as well as at the trial's conclusion. Such actions are condemned when done by the prosecution, but are no less acceptable when undertaken by the defense.

The objection was sustained on the basis of form, in any event, and defense counsel instructed to put his questions more in the context of the case (R 2357). Defense counsel was then able to pose a more damaging question, more in the context of the case:

> Q. Your plan was then, by any means, whether by using truth or lie, to get him out of the house without his knowing that he was arrested? (R 2357).

Even if there was error in sustaining the objection initially, it was subsequently cured, as the defense was allowed to ask

substantially the same question in an even more damaging form, that had earlier been disallowed. When the court errs in disallowing certain evidence or a question or series of questions on cross-examination but substantially the same matters sought to be presented or elicited are brought before the jury through other testimony of the same or another witness, the error is harmless. Palmer v. State, 397 So.2d 648 (Fla. 1981); Morgan v. State, 415 So.2d 6 (Fla. 1982).

After the Appellant was taken to the sheriff's office, he was advised of his rights and indicated he understood them and interviewed by Detective Perkins (R 2350-2351). Detective Perkins testified that during this interview the Appellant stated "If I confess to this, I will die in the electric chair. If I don't talk I stand a chance of living" (R 2351). It was brought out on cross-examination that although Detective Perkins does use tape recorders in his work, he did not bring one into the office to record what was said between himself and the Appellant and no memorandum was prepared of the conversation other than a statement he typed up immediately after the interview, which did not include the substance of the conversation except for the Appellant's quote (R 2361-2364). Perkins could also not recollect the questions he asked and the answers that were given except for this quote he typed up (R 2368).

Defense counsel then went on to ask on cross-examination whether it was not actually the detective and not the defendant who said "If you don't confess you'll go to the electric chair." The detective responded that he would not make a statement like

that (R 2369). The following dialogue then ensued:

> Q. Well how do we know? We don't have any memorandum do we, of what you did say, and you say you do not recall what was said. Now is, I ask you, sir, is your memory really that selective?
>
> A. I did not make that statement, Mr. Pearl.
>
> Q. But there isn't any proof of that, is there?

The State made an objection to the last question on the basis it was argumentative and had been asked and answered (R 2369). Before making a ruling the trial court stated: "Mr. Pearl, I think the point's been made four times, if I counted correctly" (R 2370). Defense counsel concurred in the court's assessment and said "All right, sir. If you think that's sufficient, Judge", (R 2370) The court then sustained the objection.

Defense counsel, having acquiesced in the court's assessment of his question, never presented any grounds to the lower court to consider as a basis of admissibility for such a line of questioning. It is obvious that defense counsel, as well as the court, felt that he had made his point. It is well established that, except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. Steinhorst v. State, 412 So.2d 322, 338 (Fla. 1982); State v. Jones, 377 So.2d 1163 (Fla. 1979); State v. Barber, 301 So.2d 7 (Fla. 1974).

Even if this Court were to consider the argument the Appellant presents; that the court sustaining the objection deprived him of the opportunity to have the jury observe the officers demeanor, this Court should find such a contention to be without merit. The Appellant alludes to bad faith on the part of the police in that

a "plan" existed to arrest the Appellant and further, that if they were acting on good faith, they would have tape recorded the interview with the Appellant. In order to have developed the defense theory now asserted, defense counsel would have had to go beyond the scope of direct examination. This is a case in which it would have been proper to require the defendant, to develop his theory, to call his own witnesses, as this theory was clearly a defensive matter well beyond the scope of direct examination. The Appellant had every opportunity to pursue and establish bad faith on the part of the police during the presentation of his own case. Not having established the same, the issue is not a viable one on appeal.

CHARLES WESTBERRY

Charles Westberry, the key witness for the State was asked by defense counsel "Were you also advised by the prosecutor or anyone else that by having been charged with the crime of accessory after the fact, later reduced under your contract to compounding a felony, that you have in effect as a matter of law been immunized from ever being prosecuted yourself for the murder of Lima Paige Smith?" (R 2163). A hearsay objection by the State was sustained (R 2164). The Court instructed defense counsel that he could rephrase the question but defense counsel replied that he does not know how he could rephrase it so that it would be acceptable (R 2164). The State would submit that this question could have been acceptably rephrased by defense counsel had he given it some thought and it is not the province of the trial.

court to instruct counsel as to how to properly phrase their questions. Clearly, a party may not complain of a denial of his right to cross-examine when he voluntarily chooses not to pursue a line of questioning, or to rephrase an objectionable question. The objection was sustained only as to the question as framed not as to the admissibility of the actual evidence. The Appellant also complains of the fact that when Westberry admitted lying to Detective Douglas, defense counsel inquired of Westberry how did he determine which version was the truth, to which an objection was immediately sustained, again on the basis on the form of the question (R 2168). Again, rather than rephrasing the question, defense counsel replied "No, your honor. If you don't mind, I will just travel on." (R 2168). Similiarly, when Westberry added facts to a sworn version previously given to the police, defense counsel inquired "Don't you think that rather looks like what you might call a recent invention?" (R 2181). Again, an objection was sustained on the basis of the form of the question (R 2181). It is clear from defense counsel's failure to pursue the line of questioning in each of these instances that the questions were in themselves rhetorical or editorials and that counsel had indeed established his point through the question itself. The defense was not hampered in any manner from establishing bias on the part of this witness and was, in fact, able to introduce into evidence a document showing that the witness was given immunity

from prosecution for having entered the residence of Lima Paige Smith prior to February 5, 1983, and further questioning upon cross-examination established that the witness was not told by Taylor Douglas that he was a suspect in the Smith murder, evidencing a reason why he would not be prosecuted for the murder of Smith in any event, aside from immunity (R 2166-2168). The fact that the witness had lied to Detective Douglas and told him the defendant had spent the entire night at his trailer from 1:30 or 2:00 in the morning on, was fully explored on cross-examination (R 2168). It was also brought out in the witness' two statements to Attorney Dunning and Taylor Douglas and Detective Baker that the witness didn't say anything about going to a 7-11 store with the defendant or by Smith's house on the way to Messers (R 2180-2181). It is clear that cross-examination was not restricted and counsel was not limited in achieving his goals of shattering the credibility of this witness or in establishing bias.

The defense elicited further testimony from this witness that he and the Appellant engaged in a business relationship in which they obtained scrap metals and resold them, dividing the proceeds equally in a series of local transactions (R 2196). The Appellant had sought in a proffer of this evidence to bring out the additional fact that they obtained the scrap metals by stealing them, which proffer was denied (R 2192). The basis of the denial was that the

proffer did not demonstrate anything other than the bad character of the witness (R 2190-2191). It is well settled that although the general reputation of a witness for truth and veracity may be shown, it is improper to allow inquiries as to the general moral character of a witness and a witness may not be impeached by reference to specific acts of misconduct not resulting in a criminal conviction. Chavers v. State, 388 So. 2d 1118 (Fla. 5th DCA 1980); Canet v. Turner, 606 F.2d 89 (5th Cir. 1979); Watson v. Campbell, 55 So.2d 540 (Fla. 1951); Hitchock v. State, 413 So. 2d 741 (Fla. 1982), cert. denied, ____ U.S. _____103 S.t. 274 (1982). The trial court properly refused to admit such evidence of a prior crime or misconduct for which there was no conviction and the actual testimony elicited would accomplish the Apellant's avowed purpose of showing that the witness wanted to get the Appellant out-of-the-way so he would not have to split the proceeds of the scrap metal sales, without having the jury know that the scrap metal was acquired by illegal means.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE APPELLANT TO REOPEN HIS CASE IN ORDER TO PRESENT NEWLY DISCOVERED EVIDENCE, WHICH WAS DISCOVERED AFTER THE CLOSE OF ALL THE EVIDENCE BUT PRIOR TO ANY ARGUMENT OR INSTRUCTION OF LAW BEING GIVEN TO THE JURY.

It is well settled that reopening a case for additional testimony is discretionary. Hoey v. Fletcher, 39 Fla.325, 22 So. 716 (1897). This discretion is not removed simply because a case is a capital one. See, Stewart v. State, 420 So.2d 862 (Fla. 1982). It is the State's firm position that there was no abuse of discretion in this case.

The trial court denied the defendant's motion to reopen its case based on the testimony of Kathy Waters (R 2677). In so ruling the court stated:

> ...in making this ruling I do not attribute to the defense, any type of bad motive or bad faith, as I did not attribute to the state when a previous matter was brought to our attention; did not attribute any bad motive or bad faith. I think that counsel has acted with the greatest of professionalism in this case. But if we allow people to come out of the woodwork, as it were, and to testify in support of one side or the other, almost as if that testimony were tailor-made and after that witness had had the opportunity to know and discuss and confer at great length with numerous people concerning the facts in the case and concerning the testimony of people in the case, if the rules governing disclosure, if the rules of

> sequestration are to mean anything, then there must be an end to it, and I'm going to deny the motion on that basis. (R2678).

With all due respect to a well meaning citizen, the State would submit that there is no more apt description of this witness than as "coming out of the woodwork with almost tailor-made testimony." This is not simply a citizen who has come forward with valuable information. This is a witness who has monitored the entire trial through conversations with her sisters, who were present at the trial, and by reading the newspaper (R2625-2626; 2631). This is a witness who went to school with the Appellant's two sisters (R2630). This is a witness who had the Appellant's sister come to her home for dinner as late as Monday,where they talked about the trial and the testimony concerning the glass bottle and little glasses (R2630-2631). This is a witness who voluntarily came forth and testified that as she turned south on State Road 19 she observed a lanky-skinny ,white ,young person wearing dark pants with medium length hair, walking north on State Road 19 toward Charles Westberry's residence (R2615-1617;2634;2654-2655). This testimony was corroborative of the testimony of Jackie Lee Bennett and the Appellant, and it left an inference that the Appellant may have been that lanky-skinny,white,young person wearing dark pants and may have been where he said he was at that time. After spewing forth this testimony the witness was admonished by defense counsel not to talk to Diane, Appellant's sister or anyone and the witness responded "I won't even sit with them, I'll stay away from them" (R2640). In response to

that the trial judge said, " that's the best idea you've had all day, lady." (R2640). This is a witness who, upon reflecting on her former testimony, thought better of it and asked to step back into the courtroom, stating that she had remembered something else, and partially recanted her testimony (2646). She was questioned as to whether it was still her testimony that she did not know who the lanky-skinny person walking down State Road 19 was. Her recantation is obvious from the ensuing colloquy:

> MR. PEARL: Well, I want to get something straight now.
> Do you have any other knowledge, or do you have anything else to tell the Court along the lines that you think it was Jody or you believe it was, or do you have anything more that would tell you who it was?
>
> THE WITNESS: No, sir.
>
> MR. PEARL: Is it still your testimony that you don't know who it was?
>
> THE WITNESS: No, sir. If I had known -- if it would have been, and I'd known it, I would have picked him up and took him to where he wanted to go, because I do know him.
>
> MR. PEARL: But you say he doesn't know you.
>
> THE WITNESS: I don't think so, unless it's -- like I say, unless it's because of Mary Jo and Wanda and Sherry, because if you look we all do have a family resemblance on our daddy's side. That's all.(R2648-2649).

It is obvious that the prejudice to the State from the testimony of this witness would not be simply that of surprise or delay in verifying such testimony, but also includes the fact that this is a witness who has monitored the trial, never

having been subject to the rule of sequestration and who then steps forward and interjects herself into the proceedings to corroborate prior testimony of witnesses, of which she had knowledge. Allowing the testimony of such a witness would not only cause surprise and delay but would thwart the entire purpose of the rule of sequestration, which inures to the benefit of the state as well as the defendant, especially in view of the fact that this testimony does appear to be "tailor-made". Indeed, the rule of sequestration is intended to prevent the shaping of the testimony of a witness. Unless a trial judge can be said to have abused his discretion in deciding whether to exclude a particular prospective witness under the rule of sequestration, his decision will not be disturbed. The burden is on the complaining party to demonstrate an abuse of discretion in the trial judge's decision and to show resultant injury. Spencer v. State, 133 So.2d 129 (Fla. 1961); Ali v. State, 352 So.2d 546 (Fla. 3d DCA 1977). Although this was a surprise witness, to both the defense and the State, the State would submit that the rule of sequestration is a concern in this case because if this witness had come forth sooner, clearly, she would have been placed under it and because she didn't come forth she was permitted to virtually monitor whatever aspects of the trial she found interesting only to step forth later with testimony that was corrobative; only because of the fact that she had been following the trial and was aware of testimony that had preceded her testimony. It cannot be claimed that this witness' testimony was not prompted and colored by the testimony of witnesses preceding her at trial. The very fact she stepped forward was

due to her desire to corroborate prior testimony which, had she been under the rule of sequestration, she would have had no knowledge of. In this respect, her testimony was not only colored but tailor-made and such fact properly paints her not as a simple citizen in possession of valuable information but as a person who desired to interject herself into judicial proceedings when she feels it is appropriate. A criminal trial is a little more circumspect than a simple talk show, where members of the audience may be permitted to interject themselves into the proceedings to resolve the issues under discussion. To permit such actions in the judicial arena is to demean the law and the legal system. The Appellant has demonstrated no abuse of discretion in the trial court's refusal to reopen the case to receive the testimony of this witness.

The Appellant has further, not demonstrated that such action resulted in injury, a misguided verdict or a miscarriage of justice. While the Appellant portrays this testimony as corroborative, in the context of the entire hearing conducted below, it is not so. The court need only review the above recantation of the witness to conclude that it was not the Appellant she observed walking down Highway 19 that evening. Moreover, her testimony would not be corroborative of the testimony of Jackie Lee Bennett, as she did not even observe Jackie Lee Bennett at the place he said he was, the parking lot by the convenience store (R2637). Jackie Bennett testified that he observed three strangers walk down Third Avenue, the victim's street between 10:00 p.m. and 12:00 p.m. on Saturday evening(R2484-2488). This witness testified that that was

not an unusual place for people to be (R2636). Further, she did not see them walking back down Third Avenue toward Smith's house (R2636). Moreover, she did not encounter these three unknown people until after 12:00 p.m. as she had left the fountain down by the river then. (R2614). She further cannot identify these three people and does not know whether they were even male or female (R2619). Her testimony is simply not corroborative of the testimony of Jackie Lee Bennett as she did not view these people within the same time frame that Bennett did and there is absolutely nothing to indicate that these are the same three people Bennett saw. Nor did she see them in the exact place that Bennett did. Not only is her testimony not corroborative, but it has no real probative value to any issues in the case, therefor no prejudice to the Appellant can be demonstrated by the exclusion of such testimony.

POINT III

THE TRIAL COURT DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, § 16, OF THE FLORIDA CONSTITUTION BY INSTRUCTING THE JURY THAT EVIDENCE OF A PRIOR CRIME COMMITTED BY THE APPELLANT "WILL BE CONSIDERED BY YOU FOR THE LIMITED PURPOSES OF PROVING... IDENTITY...ON THE PART OF THE DEFENDANT."

During the State's case, Paul House testified that approximately a month before the murder of Lima Paige Smith, he and the Appellant entered the Smith residence during the day through a rear window in order to view the unusual condition of the house (R 2389-2393). No one was present at the Smith residence at the time and they fished change out of the garbage (R 2391). House testified that he thought the Appellant also got some change (R 2392). They went in the kitchen and the living room, and House did not go in any other part of the house, nor did he see the Appellant go into any other room, and the Appellant was not out of his sight, that he knows of (R 2392-2393).

In regard to this testimony, the trial judge instructed the jury as follows:

> ...Ladies and Gentlemen, the evidence you are about to receive or that portion of that concerning evidence of other crimes allegedly committed by the defendant, will be considered by you for the limited purposes of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant. And you shall consider that evidence only as

> it relates to those issues. However, this defendant is not on trial for a crime that is not included in the indictment. (R 2388-2389).

The Appellant conceded that the testimony might be used to show preparation or knowledge, but did not prove motive, opportunity, or intent and was not relevant to the issue of identity (R 2386).

Evidence of collateral offenses is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted. Such evidence is relevant when it shows either motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality. Williams v. State, 117 So.2d 473 (Fla. 1960). The Appellant did object to the admissibility of this evidence at trial but then conceded that it would be relevant and admissible to show preparation or knowledge (R 2389-2396; 2386). Since the Appellant concedes that the above testimony was admissible for some proper purpose, it cannot be said that the sole relevancy of such testimony was to establish bad character or propensity of the accused or that the accused was injured in any way by the admission of such testimony. It is obvious that such testimony has passed the threshold requirement of "relevancy" enunciated in Williams. The sole issue, on appeal, then, is whether the above limiting instruction given by the trial court allowed the jury too much discretion in applying such testimony to categories enunciated in the limiting instruction.

The Appellant escalates the seriousness of his argument by citing Drake v. State, 400 So.2d 1217, 1219, (Fla. 1981), and arguing that, in essence, the prior crime was not relevant as to the identity of the perpetrator of the latter crime, so that reversible error has occurred since the testimony was inadmissible on this issue. The Appellant overlooks, however, the fact that he concedes that this testimony is admissible for an acceptable purpose other than showing bad character. Admissibility of this testimony cannot now be an issue. The issue is the discretion afforded the jury by the limiting instruction.

For the State to address each and every purpose for which such testimony would be admissible, would result in a treatise, something this Court is not prepared to address, and counsel is not prepared to undertake within the limited confines of an appellate brief. The state would submit the onus is on the Appellant to show wherefor he was harmed by the giving of this limiting instruction. Even when a collateral offense is not relevant to any issue of material fact, and is inadmissible en toto, such error is harmless in the absence of a showing of prejudice by the defendant. Waterhouse v. State, 429 So.2d 301 (1983). Such a showing of prejudice is even more mandated in a case such as the instant one,where the issue is not even the admissibility of the testimony, but simply the giving of a jury instruction in regard to testimony that is admittedly admissible. The Appellant having made no showing of prejudice, this Court cannot presume that the Appellant was injured, especially in view of the fact

that the record does not show that the jury misconstrued the purpose of such testimony or misapplied it in arriving at a verdict. The Appellant has not only failed to show prejudice but has also failed to show that the result of this instruction was that of error. Moreover, the Appellant doth protest too much. The Appellant contends that the only independent evidence of guilt aside from his confession is his fingerprint found on a stove in the victim's bedroom (Appellant's Brief page. 7). The Appellant did not call this witness himself, but in closing argument relied on this very evidence to show lack of identity i.e. that the Appellant's print had been left in the house not at the time of the murder, but when he had previously entered the house (R 2768-2769). Clearly this evidence was relevant as to the issue of identity and the Appellant utilized it to the full extent.

POINT IV

THE TRIAL COURT DID NOT VIOLATE THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE TESTIMONY WAS NOT A COMMENT UPON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT AND NO CONTEMPORANEOUS OBJECTION WAS MADE BY APPELLANT TO THE INTRODUCTION OF THIS TESTIMONY.

The State's witness Detective Walter Perkins testified that he saw the Appellant in the office of Captain Cliff Miller, and he conducted an interview of the Appellant after first advising him of his rights, after which the Appellant indicated he understood those rights (R 2349-2351). During the course of the interview Perkins testified the Appellant stated "If I confess to this I will die in the electric chair. If I don't talk I stand a chance of living." (R 2351).

No objection was made at trial to the testimony of this witness, reflecting Appellant's statement, and thus the issue was not preserved for appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). In the absence of fundamental error this court will not consider an issue raised for the first time on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982) It is the State's position that the admission of such testimony was not error and the State is in no manner or form conceding error, but should this court find error, it could not be of the magnitude that would have prevented the jury from reaching a fair and impartial verdict, so as to render the error fundamental, especially in comparison with the Appellant's damning admission to Charles Westberry that he had killed Smith which makes the

instant statement innocuous in contrast. No different result would have been reached. See, United States v. Hastings, ___ U.S. ___, 103 S.CT. 1974 (1983); State v. Murray, 443 So.2d 955 (Fla. 1984).

Even had the defense intervened with a timely objection and motion for mistrial, this statement is not fairly susceptible to interpretation by the jury as a reference to the Appellant's exercise of his right to remain silent.

For a comment on the accused's exercise of his right to remain silent to have occurred, the accused must have actually exercised his right to remain silent. During the questioning the Appellant had disavowed any knowledge of the murder (R 547). Rather than an exercise of his right to remain silent, the denials amounted to a waiver of that right. Donovan v. State, 417 So.2d 674 (Fla. 1982); United States v. Jones, 486 F.2d 599, 600 (5th Cir. 1973). There is no requirement that there be a written or oral statement of the waiver of the right to remain silent. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed2d 286 (1979). After the Appellant made the statement in question, there was a brief conversation and the Appellant then stated that he wanted to talk to an attorney (R 547). The Appellant did not invoke his right to remain silent until well after the statement was made, and since the statement was not itself an invocation of the right to remain silent, comment upon it is not forbidden. Under the facts of this case and the context of this statement, it could even be persuasively argued the Appellant did not exercise his right to remain silent (although he did not make a full confession). See, Andrews v. State, 372 So.2d

143,151 (Fla. 3rd DCA 1979). The crucial aspect of the challenged testimony is that it was not elicited to show that the Appellant did not say anything at that time. See, also, Williams v. State, 353 So.2d 588, 590 (Fla. 3rd DCA 1977).

This issue has been conclusively determined in Antone v. State, 382 So.2d 1205, 1213 (Fla. 1980), cert. denied 449 U.S. 913, 101 S.Ct. 287 (1980). Upon his arrest, the defendant complained of chest pains and was taken to the hospital and placed in the coronary care unit. With the approval of the attending physician, an F.B.I. agent entered the room. The defendant did not volunteer any information, but made one statement, that he was "a hundred percent Sicilian and Sicilians do not fink." This court held:

> ...We find this testimony permissible as it recounted Antone's affirmative statement. In fact, Antone did not stand mute; Arwine's testimony comments not on Antone's silence but on what he said. Further, defense counsel interposed no objection at trial and, therefore, there is no fundamental constitutional error. Clark v. State, 363 So.2d 331 (Fla. 1978)

382 So.2d at 1213.

The same considerations apply in the instant case as it is clearly within the ambit of Antone, and the same result should be reached.

Appellant's remaining arguments are conclusionary and not supported by the record or the law. Bad faith on the part of the police is not established. There is further no requirement that they record interviews with defendants. More importantly, Appellant's conclusion that the statement was obtained

in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments is one that should have been advanced below in the form of an objection to the introduction of this testimony. The issue is now waived. Clark; Castor, supra.

POINT V

THE CONVICTION FOR GRAND THEFT SHOULD BE AFFIRMED AS THE CORPUS DELICTI OF THE CRIME WAS ESTABLISHED BY EVIDENCE OTHER THAN THAT OF THE CONFESSION OF THE APPELLANT AND SUCH GROUNDS WERE NOT PRESENTED TO THE TRIAL COURT.

The law of this State is well-settled that unless the issue of sufficiency of the evidence to support a verdict in a criminal case is first presented to the trial court by way of a motion for acquittal or motion for new trial, the issue is not reviewable on direct appeal from an adverse judgment. There is only one exception to this rule: The Supreme Court of Florida in a capital case in which the death sentence has been imposed is empowered to make an independent review of the record to determine whether the evidence is sufficient to support the verdict regardless of whether the issue was presented to the trial court by proper motion. Tibbs v. State, 337 So.2d 788 (Fla. 1976); State v. Barber, 307 So.2d 7 (Fla. 1974); Mancini v. State, 273 So.2d 371 (Fla. 1973); §921.141(4), Fla.Stat. (1975). However, second degree grand theft, being a non-capital offense, no independent review of the record to determine whether the evidence is sufficient to support the verdict is required, if the issue is not first presented to the trial court by proper motion. See Sundell v. State, 354 So.2d 409 (Fla. 3d DCA 1978).

In the instant case, the motion for a new trial did not raise the issue now appealed (R700-704). The motion for judg-

ment of acquittal made at trial was later renewed, but was in essence a factless recapitulation of the previous motion. (R 705) At trial the defense made a motion for judgment of acquittal but only because he felt compelled to do so and stated on the record that counsel did not feel optimistic about how the court would rule on the motion for judgment of acquittal (R-2405). Counsel did not raise the issue that aside from Charles Westberry's account of Appellant's confession to the crime of theft there was no proof to establish the taking of property of Smith. Counsel chose not to point out inconsistencies between Westberry's testimony and the testimony of other witnesses, preferring to point out such inconsistencies in final argument (R-2405). Nor did counsel argue that this confession was the only evidence of the crime but argued instead, that the fingerprint on the stove was not credible evidence (R-2403). Counsel, in essence, did not argue the "lack" of necessary evidence, but only the inadequacy of the evidence adduced and argued no specifics or facts in regard to the crime of second degree grand theft (R-2402-2407). In view of this, the State would submit that this Court need not address the issue on appeal.

The weight of the evidence is a determination of the trier of fact that the greater amount of credible evidence supports the one side of the issue or cause than the other. A finding that the verdict is against the weight of the evidence is not a finding that the evidence is legally insufficient. An

appellate court should not retry a case or reweigh conflicting evidence submitted to the jury but, rather, its concern on appeal must be whether, after all the conflicts in evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, there is substantial, competent evidence to support the verdict and judgment. Tibbs v State, 397 So.2d 1120 (Fla. 1981). The evidence in the instant case was legally sufficient to support the verdict and the instant conviction should not be disturbed on appeal.

Aside from Charles Westberry's account of the appellant's confession to the crime of theft there was substantial evidence to establish the taking of the property of Lima Paige Smith. After first confessing to Westberry, the Appellant, while seated in Westberry's pick-up truck produced two hundred and ninty some odd dollars and gave most of it to Westberry (R-2138). This occurred on the eve of the murder. Although the Appellant claimed to have been playing cards that evening, raising an inference that whatever money he had the night of the murder may have been obtained by winning at a card game, Kenneth Westberry testified that they had played a poker game for nickels, dimes and quarters for a period of approximately three hours, and although the Appellant was winning, considering the amount of the pot, it was Westberry's belief that the winner would have won approximately twenty to thirty dollars (R 1869). In January of 1983, the Appellant worked for Terry Geck only part-time (R-1894). Prior to the murder, the Appellant had stated to William Barkley

that "It's about time for the old lady to die." (R-2378). Barkley also testified that the defendant stated that "there would probably be money in the house between all the papers and stuff" (R-2378). The Appellant had previously been in the house with Paul House and looked around and got change out the garbage (R-2391). Further, a fingerprint was found on a stove in the victim's house belonging to the Appellant (R-2039).

The State would conclude that aside from Appellant's confession, there was competent and substantial independent proof of the crime and the conviction of second degree grand theft should not be reversed on appeal.

POINT VI

THE TRIAL COURT DID NOT COMMIT A PALPABLE ABUSE OF DISCRETION IN NOT INSTRUCTING THE JURY AS TO THE LAW GOVERNING CIRCUMSTANTIAL EVIDENCE AND DID NOT ERR IN RESTRICTING FINAL ARGUMENT OF DEFENSE COUNSEL CONCERNING SUCH LAW.

Formerly, an instruction on circumstantial evidence was required where the prosecutor relied solely or substantially on circumstantial evidence to prove the essential elements of the crime charged. Perez v. State,371 So.2d 714 (Fla. 2d DCA 1979). In In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981) this Court explicitly stated that the circumstantial evidence instruction is now unnecessary because the instructions on reasonable doubt and burden of proof are sufficient to properly instruct the jury and a separate instruction solely on circumstantial evidence would be duplicative. This Court noted, however, that "the elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case." 431 So.2d at 595.

The action of the lower court should not be disturbed on appeal unless a palpable abuse of discretion is clearly shown from the record. The Appellant has not shown the trial judge's action to be abusive of his discretion. The State's case sub judice consists of no more reliance on circumstantial evidence than did the cases of Williams v. State, 437 So.2d 133 (Fla. 1983),

Rembert v. State, 445 So.2d 337 (Fla. 1984) and White v. State, 446 So.2d 1031 (Fla. 1984) where this Court refused to find abuses of discretion.

Even if an abuse of discretion could be demonstrated, the error must be harmless beyond a reasonable doubt as instructions on reasonable doubt and burden of proof were given and the circumstantial evidence instruction is merely duplicative of those. In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981); White v. State, 446 So.2d 1031 (Fla. 1984)(R 2871,2874,2875,2878,2880-2881).

The law and statutes applicable to any case must be given to the jury by the court and not by counsel. Brownlee v. State, 95 Fla. 775, 116 So. 618(1928). By invading the province of the trial court and attempting to eliminate judicial discretion by himself instructing the jury pursuant to his favored instruction, defense counsel invited comment by the trial court and cannot be heard to complain on appeal of admonishment before the jury.

POINT VII

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

In determining, in a murder case, whether the sentence of death should be imposed, the aggravating factor that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody encompasses the murder of a witness to a crime as well as law enforcement personnel; however, the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official, and proof of the requisite intent to avoid arrest and detection must be very strong. Riley v. State, 336 So.2d 19 (Fla. 1978), cert. denied, ___ U.S. ___, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

Proof of the requisite intent to avoid detection is strong when the defendant admits knowing the victim. Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983). This circumstance has also properly been found in instances where defendants have told the police or third parties of the purpose of the killing, by such diversified statements as "dead witnesses are the best witnesses," or "dead witnesses don't talk." Bottoson v. State, 443 So.2d 962, 966 (Fla. 1983); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983). Or in a

confession detailing the victim's threats to call the police when the defendant initiated a rape upon the victim. Elledge v. State, 408 So.2d 1021 (Fla. 1981), cert. denied ___ U.S.___ 103 S.Ct. 316 (1982). Or in a postarrest statement stating that he choked and beat the victim to make her be quiet and to keep her from telling her mother about the sexual intercourse. Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert. denied ___ U.S.___ 103 S.Ct. 274 (1982). This capital defendant was no less loquacious than his predecessors, telling Charles Westberry that he cut Smith's throat because she recognized him and he didn't want to go back to prison (R 2139). The proof of requisite intent to avoid detection is no less great in this case than in previous ones. See, also, Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984) (defendant told a detective that he shot a second time to prevent the clerk from being a witness against him).

The Appellant sets sail on a sea of semantics by contending that the court's finding is facially defective in that it alludes to the existence of other reasons for the murder and further states that the Appellant's statement to Charles Westberry "indicates" the motive for the killing. The Appellant concludes the term "indicates" indicates that this factor was not proven beyond a reasonable doubt.

The State would simply respond that substantial, competent evidence supported the express finding of the trial judge that the murder was committed to avoid detection or prevent Appellant's arrest and imprisonment on burglary charges (R 2139).

The written findings reflect specific application of the facts to this aggravating circumstance. There simply is no prescribed form for the order containing findings of mitigating and aggravating circumstances in a capital murder prosecution. Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). There is nothing to indicate that this aggravating circumstance was not proven beyond a reasonable doubt.

POINT VIII

THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE OF "COLD, CALCULATED AND PREMEDITATED" MURDER, AND SAID FINDING DID NOT CONSTITUTE A DOUBLING-UP OF THE AGGRAVATING CIRCUMSTANCE OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER."

The facts of this case are sufficient to show the heightened premeditation required for the application of the aggravating circumstance that this murder was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification" as it has been defined in McCray v. State, 416 So.2d 804 (Fla. 1982); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 111, 1102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982), and Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed. 862 (1982).

Section 921.141(5)(i), Florida Statutes, became effective July 1, 1979, and added the aggravating circumstance that "the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The addition by the legislature of paragraph (i) to section 921.141(5) only reiterates in part what is already present in the elements of premeditated murder. Although consideration of aggravating factors must be limited to those set forth in the statute, the elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration

when imposing a sentence in a capital case as well as in other criminal cases. Combs v. State, 403 So.2d 418, 421 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed. 862 (1982). Paragraph (i) adds to the statute the requirement that in order to consider the elements of a premediated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." 403 So.2d at 421.

The level of premeditation needed to convict in the guilt phase of a first-degree murder trial does not necessarily rise to the level of premeditation required in section 921.141(5)(i). Preston v. State, 444 So.2d 939, 946 (Fla. 1984) (correcting an inadvertent error made in Jent,supra, where the court stated that the level of premeditation needed to convict in the penalty (sic) phase of a first-degree murder trial does not necessarily rise to the level of premeditation required in section 921.141(5)(i)).

The Appellant submits that the "premeditation" required to find the circumstance of a cold, calculated and premeditated murder is the premeditation that exists with a planned course of conduct, and there is nothing to suggest that this particular murder was planned in any way. This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e. g. Jent v. State, supra. Middleton v. State, 426 So.2d 548 (Fla. 1982); Bolender v. State, 422 So.2d 833

(Fla. 1982), cert. denied, ____U.S. _____, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983). More recently this Court has held that this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness-elimination murders, although this description is not intended to be all inclusive. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984).

It is the State's unalterable position that the facts of this case show "a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator."

This is not simply a case where the victim discovered the Appellant, a person known to her, committing a burglary and the murder was extemporaneously committed for the purpose of avoiding a lawful arrest and there was no heightened degree of premeditation, calculation or planning. See, Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). The record shows that the Appellant broke into Smith's home, armed himself and attacked her when she discovered him in the room, only after first brutally raping her. (R 2134-2136; 1821). Nothing indicates that she provoked the attack in any way or that the Appellant had any reason for committing the murder, other than witness-elimination. Cf. Mason v. State, 438 So.2d 374, 379 (Fla. 1983).

It cannot be logically argued that the murder was not planned from the fact that the instrument of death may have come from the victim's premises. Cf. Harris v. State,

438 So.2d 787, 798 (Fla. 1983). Because the Appellant first brutally raped the victim after she had discovered him, he had plenty of time to reflect upon whether to spare her life or eliminate her as a witness against him, and he chose to eliminate her, stabbing or slashing her twelve times in the neck to ensure that death could be the only result (R 1819). Despite her subjection to the brutal rape she was savagely stabbed to ensure death,and did die from bleeding into the lungs and shock (R 1821). Because this witness knew the Appellant, she could have identified him as a burglar. The Appellant had nothing to lose by sexually battering her because he had no intention of returning to prison on even a burglary charge. This elderly woman's fate was sealed when first she saw the Appellant. The sexual battery, however, gave the Appellant time to reflect upon his initial decision and change his course of conduct. The witness-elimination in this case was not reflexively carried out upon discovery.

The murder in this case was "execution-style" with the only available weapon and committed after degrading and seriously injuring the elderly woman. Although the weapon was probably a pocketknife, and less sophisticated than the weapons employed in some execution-style murders, the killing in the case sub judice is without relevant distinction from similar cases where the application of this aggravating factor has been affirmed. See e.g. Routly v. State, 449 So.2d 1257 (Fla. 1983); Smith v. State, 424 So. 2d 726 (Fla. 1982).

Although this murder occurred during the commission

of a burglary and theft, it is not susceptible to other conclusions than finding it committed in a cold, calculated and premeditated manner. Cf. Peavy v. State, 442 So.2d 200, 202 (Fla. 1983). Here the victim was not a male or an unviolated female who was simply killed incidentally in the res gestae of a burglary or theft. The victim was, instead, an elderly female who was not spontaneously killed but first sexually brutalized and toyed with as a cat may do with a mouse before administering the final coup de grace. Nothing is colder or more calculated or more diabolically premeditated.

The Appellant insists that this aggravating factor applies only to execution-style or contract murders or where there was a pre-existing plan to murder, although this Court has most recently stated that this factor was also applicable to witness-elimination murders and that the description of this factor is not intended to be all-inclusive. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984).

In Herring, the evidence reflected that the appellant first shot a store clerk in response to what he believed was a threatening movement by the clerk, but then shot the clerk a second time after he had fallen to the floor. The appellant told a detective that he shot a second time to prevent the clerk from being a witness against him. This Court found the facts of that case sufficient to show the heightened premeditation required for the application of this aggravating circumstance. Similarly in this case the Appellant told Charles Westberry that he cut Smith's throat because she

recognized him and he didn't want to go back to prison (R 2139). It is clear from Herring that a "substantial period of reflection and thought" by the perpetrator may encompass minutes or seconds. Here, the Appellant had significantly more time to deliberate than did the defendant in Herring and the facts in the case sub judice are more than sufficient to show heightened premeditation.

The Appellant next contends that the finding that the murder was cold, calculated and premeditated was simply a doubling of the aggravating circumstance that the murder was especially heinous, atrocious and cruel.

The aggravating factor that a murder is heinous, atrocious, and cruel pertains to the nature of the killing itself, while the aggravating factor that it was committed in a cold, calculated and premeditated manner without any basis of moral or legal justification relates more to the killer's state of mind, intent and motivation. Mason v. State, 438 So.2d 374 (Fla. 1983). The facts of the instant case reflect a heinous, atrocious and cruel killing, since the premeditated stabbing caused the victim to go into shock and bleed to death, a death which would involve a high degree of pain, and which death was preceded by a brutal rape, causing severe injury to the vaginal area which could have contributed to death, since it was a tremendous shock for a seventy-six year old woman. (R 1821-1822); See Lusk v. State, 446 So.2d 1038, 1042-1043 (Fla. 1984). Moreover, knowing the defendant, the rape must have provided time for the victim to agonize over her impending

fate. The same facts may evidence time for reflection and premeditation as previously discussed, but one finding is not the mirror image of the other as one involves the nature of the crime and the other reflects the intent of the actor. See, Hill v. State, 422 So.2d 816, 818-819 (Fla. 1982).

Even, in the event such factors would constitute an impermissible doubling up of aggravating circumstances, the fact that an improper aggravating circumstance went into the calculus of the trial judge's decision to impose the death penalty, does not compel reversal of the sentence of judgment where, as here, there are ample other statutory aggravating circumstances so that the trial judge's decision would not have been affected by the elimination of an unauthorized aggravating circumstance. Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied 449 U.S. 1118, 101 S.Ct. 931, 67 L.Ed. 2d 847 (1981).

POINT IX

SECTION 921.141, FLORIDA STATUTES, AS APPLIED DOES NOT VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDENT DUE PROCESS OF LAW.

Under the present capital sentencing statute, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances. Fla. Stat. §921.141(1). After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based on (a) whether sufficient aggravating circumstances exist; (b) whether sufficent mitigating circumstances exist which outweigh the aggravating circumstances and; (c) based on these considerations, whether the defendant should be sentenced to life imprisonment or death. Fla. Stat. §921.141(2). Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts. Fla. Stat. §921.141(3).

The Sixth Amendment to the United States Constitution may guarantee a defendant the right to a jury trial by his peers. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d

491 (1968). It does not, however, give a defendant the right to be directly sentenced by his peers, although he is always indirectly sentenced by them for their will is reflected in the legislature's delineation of the circumstances in which the death penalty may be imposed.

It is the province of the trial judge as sentencer to ensure that this mandate is properly carried out, and at the same time, the existence of aggravating and mitigating factors eliminates arbitrariness and capriciousness and channels the sentencer's discretion. Miller v. State, 373 So.2d 882 (Fla. 1979). While in some instances the jury's avisory opinion could be a critical factor in determining whether the death penalty should be imposed, it is the trial judge who finally decides whether to impose the death penalty. Lamadline v. State, 303 So.2d 17 (Fla. 1975). The trial judge serves as a buffer where the jury allows emotion to override the duty of a deliberate determination. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). It is not necessary that the jury make written findings nor constitutionally required. It is sufficient that the trial court make such findings. It is the responsibility of this Court to review the death sentence in light of the facts presented in evidence as well as other decisions, and to determine whether or not the punishment is too great. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed. 2d 1226 (1976). The trial judge's findings in regard to the death sentence are

to ensure such review. It is not necessary or constitutionally required that the jury and the trial judge be of one mind in regard to each aggravating and mitigating circumstance. It is only necessary that upon review the sentence can be found to be a proper one.

The issue of collateral estoppel and res judicata are not applicable in the penalty proceeding in regard to facts previously determined in the guilt phase, for if they were there would be no need for a penalty hearing. Rather, the facts previously found by the jury and any other matter relevant to the nature of the crime and the character of the defendant are examined by the jury and found to be aggravating or mitigating. One involves a finding of facts, the other involves an interpretation of them. There is no basis in support of Appellant's premise that a jury's recommendation of a sentence is the same as a jury verdict as to guilt or innocence. Florida's death penalty law completely separates these two functions by establishing a bifurcated trial system. In the penalty phase of the trial, the judge must determine the sentence with the advice and guidance of the jury. Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed. 2d 239 (1977). The statute clearly provides that the jury's recommendation is advisory only regardless of whether the recommendation is for a life sentence or for death.

The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and

the character and background of the defendant. The trial court, in determining the sentence to impose, must use its judicial experience in evaluating and weighing the aggravating and mitigating circumstances with the recommendation of the jury. Herring v. State, 446 So.2d 1049, 1056 (Fla. 1984). This Court has ruled on numerous occasions that the statutorily prescribed circumstances were not vague but rather provided meaningful restraints and guidelines for the discretion of the judge and jury. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). The State would also reiterate that the statute provides a sufficient standard for weighing the aggravating and mitigating circumstances and is otherwise constitutional. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976); Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed. 2d 1060 (1979); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed. 2d 295 (1974).

This same argument has been rejected by this Court in Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed. 2d 191 (1981). Appellant's argument simply indicates a wish for the jury as sentencer but the Florida sentencing scheme is constitutional nevertheless.

Even more conclusive is the fact that such an argument should have been presented first to the trial court. It should not now be raised for the first time on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

POINT X

THE FLORIDA SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Appellant has offered a polymorphic challenge to section 921.141, Fla. Stat. (1979). The Appellant acknowledges that the issues are presented in a summary fashion in recognition of the fact that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Flordia statute and thus detailed briefing would be futile. The Appellee would agree and would contend that in the interest of judicial economy, no purpose would be served in specifically rehashing old battles in this regard. The Appellant has offered neither this Court nor any other court a sound basis for departing from its precedents in this regard. See, Spinkellink v. Wainwright, 578 F.2d 582, 609-610 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 2d 796 (1979); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed. 2d 191 (1981); Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed. 2d 598 (1981); Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed. 2d 418 (1981); Combs v.

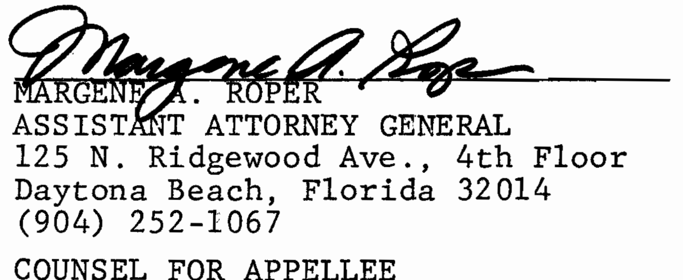
State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed. 2d 868, 862 (1982); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed. 2d 342 (1980); Mikenas v. State, 367 So. 2d 606 (Fla. 1978); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed. 2d 1322 (1982).

CONCLUSION

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

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Larry B. Henderson, Assistant Public Defender for Appellant (1012 S. Ridgewood Ave., Daytona Beach, FL 32014), this 15th day of June, 1984.

MARGENE A. ROPER
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