IN THE SUPREME COURT OF FLORIDA

RICHARD M. COOPER,

Appellant,

v.

CASE NO. 65,133

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The appellant, Richard M. Cooper, was charged by amended indictment filed April 6, 1983, with three counts of First Degree Murder. (R 34 - 35) He filed numerous pretrial motions, among them, a motion to suppress statements made by the defendant to Paul Skalnik, an inmate at the Pinellas County Jail, and a motion to suppress statments made by the defendant to police officers John Halliday and Ron Beymer. (R 136, 159 - 160) During the course of the trial, appellant made a motion to suppress physical evidence, to wit: a mask, seized from the home of his mother and stepfather, Robert and Juanita Kokx. (R 999)

The case was tried by a jury on January 10 - 13, 1984. (R 765 - 1346) At the close of the State's case, the defense moved for a judgment of acquittal on the ground that the State had failed to prove premeditation. (R 1163) The motion was denied. (R 1163) The defense put on no evidence and renewed its motion for judgment of acquittal which was again denied. (R 1165 - 1166, 1169, 1216).

On January 13, 1984, the jury returned a verdict of guilty as charged on all three counts. (R 214, 1340) Appellant was adjudicated guilty on each count and the case proceeded to the penalty phase of the trial. (R 1346)

The penalty phase of the trial commenced on January 14, 1984. (R 1379) The state put on testimony from two witnesses, Paul Skalnik and Officer John Halliday. (R 1447 - 1452; 1460 - 1462) The defense put on testimony from appellant's mother, Juanita Kokx. (R 1468 - 1496) The jury was charged without objection. (R 1603 - 1610), and after deliberation returned an advisory sentence of

death. (R 226, 1612)

Appellant filed a motion for new sentencing phase which was denied February 9, 1984. (R 235) A motion for new trial was also argued and denied on February 9, 1894. (R 234, 372 - 388)

Appellant was brought before the court for sentencing on March 14, 1984. (R 389) The defense offered the testimony of a clinical psychologist, Dr. Sidney Merin. (R 397) At the conclusion of this hearing, the court readjudicated appellant guilty and sentenced him to death on each count, the sentences to run consecutively. (R 468) The trial court's order in support of the death sentence was filed on May 30, 1984. (R 243 - 249)

The court entered Judgment against the defendant on March 14, 1984. (R 236 - 237) A notice of appeal was timely filed on March 16, 1984. (R 249) An amended notice of appeal reflecting the correct date of the judgment was filed on March 26, 1985. (R 2520)

The Public Defender for the Tenth Judicial Circuit filed a motion to withdraw as appellate counsel on April 30, 1984. (R 263 - 264) The motion was granted and an order appointing new appellate counsel was entered on May 23, 1984. (R 266) These proceedings ensued.

STATEMENT OF THE FACTS

In the early morning hours of June 18, 1982, the Clearwater Police Department received a frantic telephone call from an eight-year old boy, Christopher Fridella. (R 783)[1] The police were directed to a private residence located in the High Point area of Clearwater, Florida. When police arrived at the house they found three men lying face down on the living room floor their hands bound behind their backs with duct tape. (R 876) All of the men were dead and each body showed signs of gunshot wounds. (R 804) The young child, Christopher, was found standing in the back of the room and was immediately moved to another area of the house. (R 804) The home had been ransacked and the television set was turned up to full volume. (R 804 - 805, 876, 884) The police found six shotgun shells in the area near the front door. Four just outside the door, one just inside the door, and another inside a plant which was hanging on the front porch. (R 876)

The three dead men were identified as Steven Fridella, Christopher's father, Gary Peterson, Christopher's uncle, and Bobby Martindale, a friend of the family. The bodies were examined at the scene by Dr. Joan Wood, Medical Examiner for the Sixth Judicial Circuit of Florida. Dr. Wood testified that the victims had been dead for approximately two to three hours and they were shot from an "intermediate range" of three to four feet. (R 843, 845, 846) An autoposy

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[1] A psychiatirst, Dr. John Pierson, testified that Chris was currently experiencing stress syndrome and that this condition would seriously affect his ability to give reliable information at the trial. The doctor also testified that calling Chris as a witness at the trial would be detrimental to the child's health. (R 794 - 801).

of the victims, also performed by Dr. Wood, revealed the following. Steven Fridella suffered three shotgun wounds, one to the left side of the chest and two in the neck. Any one of the three wounds would have been fatal and death occurred within a minute or two. (R 858 - 860) Gary Peterson received a single gunshot wound to the back and his death also occurred within minutes. (R 848, 850) Bobby Martindale sustained two gunshot wounds: one to the back and another to the back of the head. The back wound was not life threatening but the head wound was fatal and death was instantaneous. (R 853 - 857) Dr. wood testified further that the condition of the bodies showed no signs of a struggle. (R 849)

On January 15, 1983, the police received information from Robin Fridella, Steven Fridella's ex-wife, which led them to appellant and accomplices Terry Royal and J. D. Walton. (R 889 - 890).[2]

The first interview with appellant took place on January 20, 1983, and was conducted by officers John Halliday and Ron Beymer of the Pinellas County Sheriff's Department. (R 910) Following Miranda warnings, appellant told police that he, J. D. Walton, Jeff McCoy (Walton's younger brother) and Terry Royal planned the robbery of the victims for a week and on June 17, 1983, they left Citrus County with that intention. They had in the trunk of the car ski masks, gloves and firearms which included two shotguns, a .357 Magnum and a .22 caliber rifle. The group was stopped for a traffic

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2 At the time of his arrest, J. D. Walton was the live-in boyfriend of Robin Fridella. (R 952)

violation while in route to Pinellas County but proceeded on after being given a verbal warning. When they arrived at Steve Fridella's house, McCoy stayed in the car and the other three entered the residence. (R 916) A blonde man, later identified as Bobby Martindale, was asleep on the couch. Appellant went to the back bedroom where Steven and Christopher Fridella were sleeping. He put the boy in the bathroom and took Fridella into the living room. Walton went into the middle bedroom which was occupied by Gary Peterson. Despite the mask, Peterson recognized Walton because he called him by name. Walton took Peterson into the living room with the others. (R 917) Appellant and Royal guarded the victims while Walton ransacked the house looking for money and drugs. (R 918, 920) After tying the victims up appellant and Royal went through their wallets and found $2.00 which appellant later turned over to Walton. (R 923)

Appellant went to one of the bedrooms to check on Walton's progress and Walton told him they were going to have to "waste" the victims. Appellant relayed this information to Royal who stated he was not going to kill anyone. (R 924) Appellant and Royal were standing in the front doorway when Walton appeared and began firing at the head of Steven Fridella. When the gun misfired three times, Walton began to scream: "Shoot them, shoot them." Royal fired first discharging his gun three or four times. Appellant fired next, shooting once at Steve Fridella. Appellant then turned and ran from the house. Walton called to appellant to come back because the victim was still moving. Appellant returned to the house and shot the victim a second time. (R 925 - 926) The four men left the house and returned to Citrus County. (R 926) Before leaving, Royal

took a clock from the house and Walton removed a scale. (R 952)

Appellant told Halliday that he had been drinking and smoking marijuana the day of the murders but he was fully aware of what he was doing. (R 929, 951) Appellant also stated that Chris was left unharmed because Walton gave strict orders that no harm was to come to the boy. (R 929)

In a second statement, given to police on January 24, 1983, appellant told Officer Halliday that McCoy accompanied them inside the house but was ordered by Walton to return to the car just prior to the shootings. Appellant also stated that it ws McCoy not himself who bound Chris and placed him in the bathroom. (R 927 - 928)

In this second statement, appellant told police that his first shot missed Fridella, but he saw blood when he fired at him the second time. (R 928)

A third inconsistency in the statement of January 24, was the amount of money taken from the victims before the shootings. In this second statement, appellant placed the amount at $5.00 and said Walton may have found more because immediately following the incident he (Walton) had a lot of money that no one could account for. (R 928)

Following the initial interview with appellant, Officer Halliday recovered three weapons from McCoy's house. The guns, all owned by McCoy, were a .22 caliber rifle, a .12 gauge shotgun and a .357 Magnum handgun. (R 930) A fourth weapon, a rifle, was found at the home of accomplice Terry Royal. (R 938) Robert Sibert, a firearm identification expert with the Federal Bureau of Investigation, positively identified the shotgun and the rifle recovered from McCoy's

home as the weapons used to shoot the three victims. (R 1072, 1085 - 1089, 1098)

In addition to this physical evidence, the police seized duct tape from the trunk of McCoy's car. (R 935) McCoy admitted this was the same tape used to bind the victims. (R 936) Police also recovered the ski mask used by appellant from the home of his mother and stepfather. (R 1115 - 1116)

Officer Ron Beymer's testimony was consistent with that of Halliday. (R 1127 - 1153) Beymer added that appellant described Walton as a "Charles Manson" type figure. (R 1156) Beymer had personally interviewed Walton and described him (Walton) as "meek and nervous." (R 1157)

The defense strategy at trial was to admit participation in the crime but to argue for a verdict on the lesser included offense of second-degree murder. During closing argument to the jury, defense counsel described the criminal episode as "the classic case of depravity." (R 1228) He then proceeded to paint a picture of appellant as a weak "follower" who was under the continuing influence of drugs, alcohol and J. D. Walton. (R 1220 - 1228, 1278 - 1313)

MOTION TO SUPPRESS STATEMENTS

On January 6, 1984, the defense filed a motion to suppress statements made by the defendant to Paul Skalnik, an inmate at the Pinellas County Jail. (R 159) The motion was heard by the court on January 10, 1984. (R 480 - 531)

Paul Skalnik, a former Texas police officer, was serving time in the Pinellas County Jail when he came in contact with appellant. (R 480 - 483, 502) Skalnik and appellant shared a cell together for two weeks. During that time appellant told Skalnik of his involvement in the High Point murders and described the episode in detail. (R 487, 499 - 500)

Skalnik testified that he was not acting as an agent for the police and that he received no reward or benefit in return for his assistance. (R 498, 502 - 503) Skalnik testified that his motivation for assisting police was two-fold: (1) the seriousness of the charges involved and (2) appellant's attitude regarding the incident. Appellant had apparently joked about the fact that the police were treating the shootings as mafia related. (R 503 - 504)

Officer John Halliday testified that he was contacted by the State Attorney's office and told to interview an inmate at the county jail who had information concerning the High Point murders. (R 516) Halliday conducted a tape recorded interview with Skalnik on June 14, 1983. He then had the two men separated for Skalnik's protection. (R 518, 519)

The defense argued that Skalnik was acting as an agent for the police and the statements were, therefore, involuntary as having been given without proper Miranda warnings. (R 520) The trial

court found no agency relationship between Skalnik and the State and ruled that the statements were voluntarily made. (R 531) The motion to suppress was denied and the case proceeded to trial. (R 169)

On November 29, 1983, appellant filed a motion to suppress statements made to police officers John Halliday and Ron Beymer. (R 136) This motion was heard during trial.

Officer Halliday testified out of the presence of the jury that he first met appellant on January 20, 1983 at the DeSoto Correctional Institute. Before talking with appellant, Halliday advised him of his constitutional rights per Miranda. (R 895 - 896) Appellant indicated he understood those rights and signed a written waiver form. (R 897) Halliday stated that he made no promises or threats in order to induce the statement, and appellant never indicated a desire to invoke his privilege to remain silent. (R 898)

Halliday testified further that he interviewed appellant a second time on January 24, 1983. Prior to this interview appellant had been placed under arrest for the High Point murders and he was now consifined at the Pinellas County Jail. (R 899) Halliday's partner, Ron Beymer, advised appellant of his constitutional rights. (R 900) Halliday testified that no threats or promises were made to induce the statement and appellant made no request for a lawyer. (R 900) The defense put on no evidence and the trial court ruled that the statements were voluntarily made. The motion to suppress was denied. (R 902)

MOTION TO SUPPRESS PHYSICAL EVIDENCE

A motion to suppress physical evidence seized from the home of appellant's mother and stepfather was raised for the first time during trial. (R999) Robert Kokx, appellant's stepfather, testified that in June of 1983, he gave police officers a ski mask which belonged to appellant. (R 1007) The mask was located in a bedroom closet inside a cardboard box.

Appellant had used the bedroom two years ago in January of 1982 when he lived with his mother and stepfather. (R 1006 1008, 1014). Appellant was arrested on unrelated charges in the summer of that year and has not lived at the house since that time. (R 1015 - 1016)

Kokx testified that appellant has no proprietary interest in the house which is owned jointly by he and his wife. (R 1013 - 1014). Although appellant paid no rent while he lived there, Kokx considered the room appellant's private area. (R 1009, 1014) Another family member has occupied the room since appellant left. Mr. Kokx removed all of appellant's personal belongings from the room in preparation for her visit. Later, Kokx took all of these items and discarded them at the city dump. (R 1011, 1020 - 1021)

Kokx testified that he gave police the mask because he thought they were acting at appellant's request. (R 1022) This testimony was rebutted by officer Halliday who testified that he did not tell Kokx he was acting at appellant's request, nor did he imply that he had judicial authorization to search the house without the owner's consent. (R1039) Halliday testified that he told Kokx he had reason to believe that a mask used by appellant during the commission

of the homicides was located inside the Kokx home. (R 1038 - 1039) He said Kokx invited him inside the house and went off to look for the mask. (R 1038) Kokx returned with the mask and gave it to the officer but requested a receipt, which he was given. (R 1038) The trial court ruled that appellant had no standing to contest the search and denied the motion to suppress. (R 1068 - 1069) The court also found that Kokx had not been led to believe that the officer was acting at appellant's request and, therefore, his consent to the search was voluntary. (R 1069)

SENTENCING

The penalty phase of the trial was held on January 14, 1984. (R 1379) Paul Skalnik was called as a state's witness and testified essentially as he did at the hearing on the motion to suppress held January 10, 1984. (R 1431 - 1459) In addition, he testified that appellant reloaded his gun before returning to the house (R 1446) and that Fridella begged for his life before he was killed. (R 1444) Skalnik also testified that appellant told him he would not receive the death penalty because he (appellant) was so young. (R 1452)

Officer Halliday also testified as a prosecution witness. He stated that appellant told him the mask had been destroyed and that he learned of its whereabouts through Skalnik. (R 1461 - 1462)

The defense presented one witness, Juanita Kokx, appellant's mother. Mrs. Kokx testified that appellant had a troubled childhood which was caused by the marital problems she had with his father, Phillip Cooper. She stated that Mr. Cooper spent very little time with appellant; was a strict disciplinarian; and used a belt to discipline the children. (R 1468, 1469) Appellant's father died of

lung cancer in June of 1980. Appellant was 16 and living with his father at the time. (R 1414)(

Both sides presented closing argument and the jury was charged without objection. (R 1542 - 1591; 1591 - 1602; 1603 - 1610) They returned an advisory sentence of death on each count. (R 226, 1612) Appellant filed a motion for a new sentencing hearing which was denied on February 9, 1984. (R235) He then filed a motion for new trial which was also denied on February 9, 1984. (R 234, 372 - 388).

Appellant was brought before the court for sentencing on March 14, 1984. (R 389) As further evidence in support of mitigation, the defense presented the testimony of a clinical psychologist, Dr. Sidney Merin. (R 397) Dr. Merin had three meetings with appellant: March 29, 1983, December 7 and 8, 1983. (R 399) Based on interviews and tests conducted at that time, Dr. Merin concluded that appellant's actions were not premeditated, but a "mindless reaction to the domination" of J. D. Walton. (R 402 - 403, 405, 420) Dr. Merin testified on cross-examination that he has reached this conclusion although he has never interviewed J. D. Walton or anyone else involved in the incident. (R 416 - 417, 423) The defense presented no further evidence and the State proffered copies of appellant's statements and the statement of Paul Skalnik. (R 440)

The court followed the jury's recommendation and sentenced appellant to death on each count, the sentences to run consecutively. (R 468) The order in support of the death sentence was filed on May 30, 1984. The court found six aggravating circumstances and no mitigating circumstances. (R 243 - 249)

SUMMARY OF THE ARGUMENT

I. Appellant had no legitimate expectation of privacy in premises which he had vacated nearly a year before the search. In addition, appellant had no legitimate expectation of privacy in personal possessions he left behind in premises vacated nearly a year before the search.

II. The trial court's finding that murder was committed during the commission of a kidnapping is supported by the evidence. The fact that appellant was not charged with kidnapping does not preclude the court or jury from considering this circumstance as cause for aggravation.

III. Evidence in the record that one of the victim's recognized one of the assailants was sufficient to support the trial court's finding that the murder was committed to avoid arrest.

IV. The events surrounding the slayings in this case were accompanied by such additional facts as to set it apart from the norm of capital felonies. The trial judge did not err in finding that the murders was heinous, atrocious, or cruel.

V. The facts of this cae are sufficient to show the heightened premeditation required by this aggravating circumstance.

VI. Mitigating circumstance of diminished capacity was waived for failure to argue such factor to the jury or to object to the court's instruction to the jury which did not include a charge on this mitigating factor.

VII. Appellant did not object to the question presented in his brief. Objections to questions not made at trial can not be raised for the first time on appeal.

VIII. The trial court's finding that appellant's age of 18 years was not a mitigating circumstance is supported by the evidence.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE OBTAINED FROM STEPFATHER'S HOME.

Appellant's stepfather, Robert Kokx, testified at the hearing on the motion to suppress that he gave police a ski mask owned by appellant because he believed the officer was acting at appellant's request. (R 1022) This testimony was rebutted by Officer Halliday who testified that he did not tell Kokx he was acting at appellant's request, nor did he imply that he had judicial authorization to search the house without the owner's consent. (R 1039) Halliday testified that he told Kokx he had reason to believe that a mask used by appellant during the commission of the homicides was located inside the Kokx home. (R 1038 - 1039) He said Kokx invited him inside the house and went off to look for the mask. (R 1038) Kokx returned with the mask and gave it to the officer but requested a receipt, which he was given. (R 1038) The trial court ruled that appellant had no standing to contest the search and denied the motion to suppress. (R 1068 - 1069)

A. The Premises

To prevail on a claim that evidence was seized in violation of the fourth amendment, the defendant bears the burden of demonstrating a legitimate expectation of privacy in the area invaded. Rakas v. United States, 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The legitimacy of the defendant's privacy claim is determined by the totality of the circumstances. Id., 439 U.S. at 152; United States v. Baron-Mantilla, 743 F.2d 868, 870 (11th Cir.

1984).

The evidence elicited at the suppression hearing clearly establishes that appellant at one time occupied a guest bedroom in his stepfather's home. Appellant's stepfather testified at the hearing that appellant came to live with he and his wife in January of 1982; appellant was arrested on unrelated charges in the summer of that same year and has not lived at the house since that time. (R 106, 1015 - 1016) Thus, when police obtained the mask in June of 1983, appellant had not lived at the house for nearly a year. Mr. Kokx testified further, that appellant had no proprietary interest in the house and he paid no rent during his stay there. (R 1013, 1014)

The District Courts of Appeal have recognized standing in cases where the defendant has resided on premises for only a short period of time, even if only on a part-time basis. See e.g., DelaPaz v State, 453 So.2d 445 (Fla. 4 DCA 1984)(part-time); Walker v. State, 433 So.2d 644 (Fla. 2 DCA 1983)(full time); Shade v. State, 400 So.2d 850 (Fla. 1 DCA 1981)(full-time). This court has drawn the line, however, where it appear clear from the record that the defendant has relinquished control or possession of the premises. See Jones v. State, 332 So.2d 615 (Fla. 1976)(consent given by landlady after defendant had abandoned shack). See also, Abel v. United States, 362 U.S. 217, 80 S.Ct. 1056, 4 L.Ed.2d 1019 (1960)(defendant paid bill and vacated hotel room); United States v. Annese, 631 F.2d 1041 (1st Cir. 1980)(defendants vacated house rented for the weekend). On the authoriity above-ceited, appellant had no reasonable expectation of privacy in premises he had vacated nearly a year before the search.

B. Personal Effects

The testimony elicited at the suppression hearing established that appellant's stepfather found the mask inside the bedroom closet in a closed cardboard box. (R 1008, 1010) There was no evidence that the box contained property other than that of the defendant. Appellant argues that his stepfather's consent to the search of the house could not extend to a box which contained only the appellant's personal belongings.

There are a line of California cases which hold that parental consent does not extend to the child's personal effects. In People v. Egan, 250 Cal. App. 2d 433, 58 Cal. Rptr. 627 (2d Dist. 1967), for example, the court held that a stepfather's consent to search an apartment shared by the defendant did not extend to a bag owned by the defendant in which the stepfather had no ownership interest. See also, 4 ALR 4th 196 at 220, Evidence-Seizure Authorized by Relative. In our own state, this court has recognized that consent given by a woman who lived with the defendant did not extend to personal effects located in a closet set aside exclusively for the defendant's use. See Silva v. State, 344 So.2d 559, 564 (Fla. 1977). In each of these cases, however, there is no dispute that the defendant resided at the premises searched. Here, however, there is evidence that appellant had not resided at the premises for nearly a year.

In the present case, the testimony established that appellant left behind personal items when he relinquished possession of the bedroom in 1982. Mr. Kokx testified that appellant did not ask him to keep the articles in storage until he returned. (R 1018) Kokx

testified further that he removed most of appellant's belongings from the room when a house guest used it during a visit. Later, Kokx took all of appellant's personal effects and discarded them at the city dump. (R 1021, 1026)

It is not a search for police to retrieve property which a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy, Freyre v. State, 362 So.d 989, 991 (Fla. 3 DCA 1978), as where a person leaves behind property in a hotel room or shack which has been vacated. Abel v. State, supra; Jones v. State, supra. Central to this line of cases is the court's reasoning that the defendant has no reasonable expectation of privacy in premises which he has abandoned or vacated. This logic may be extended to include personal items left on vacated premises. In the present case, appellant left personal articles on premises he vacated nearly a year before the search. Clearly, under the rationale of the above-cited cases, he had no legitimate expectation of privacy in the articles left behind.

Appellant cites State v. Preston, 387 So.2d 495 (Fla. 5 DCA 1980) for the proposition that consent is limited to area of equal access. The Fifth District Court of Appeal held in Preston that a mother who owns the house, pays the bills and has access to a room for cleaning purposes has sufficient joint occupancy and control for purposes of giving consent to search areas over which she has access. Compare, Silva v. State, supra (consent to search given by woman who shared house with defendant did not extend to closet used exclusively by defendnat). Assuming the stepfather had equal access to the bedroom, appellant submits that such access did not extend to

a closed box located inside the bedroom closet.

Appellant's position would be arguable if the facts established joint dominion and control of the premises. The record in this case, however, is clear that appellant had not lived on the premises for over a year and, therefore, did not share dominion and control with the stepfather. Absent a showing of joint control, the Preston opinion simply has no application to the facts of this case.

ISSUE II

THE TRIAL COURT DID NOT ERR IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED IN THE COURSE OF A KIDNAPPING.

The trial court found six aggravating circumstances and no mitigating circumstances. (R 243 - 248) The first aggravating circumstance, that the defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to the person, §921.141(5)(b), Florida Statutes. (R 245), is not contested by the appellant.

The second aggravating circumstance applied was §921.141(5)(d), Florida Statutes. That section provides:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

The trial judge found that appellant took eight year old Chris Fridella to another part of the house and confined him there with the intent to terrorize his father, Steve Fridella, one of the murder victims. The court further found that another purpose of the confinement was to reduce the risk that Fridella would resist during the course of the criminal episode. (R 245)

Appellant objects to the finding of this aggravating circumstance for the following reasons: (1) appellant was not charged with kidnapping during the guilt phase of the trial and (2) the evidence produced at either phase of the trial did not prove the crime of kidnapping beyond a reasonable doubt. We address the last

issue first.

During the penalty phase, the jury was instructed, without objection, that the murder was committed while the defendant was engaged in the commission of a kidnapping. The court said:

> The crime of murder is a capital felony. Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping.
>
> Kidnapping -- Florida Statute 787.01, before you find kidnapping as an aggravating circumstance the state must establish the following two elements beyond a reasonable doubt: Richard Cooper forcibly abducted or imprisoned another person, to wit: Chris Fridella, against his will and without lawful authority. Richard Cooper did so with the intent to commit a, [sic] inflict bodily harm upon or to terrorize the victim or another person.
>
> Confinement of a child under the age of thirteen is against his will within the meaning of this definition if such confinement is without the consent of his parent or legal guardian.

(R 1604 - 1605)

The evidence produced at both phases of the trial established that appellant removed Chris Fridella to another part of the house and confined him there. (R 917, 920, 1133, 1441) Paul Skalnik, appellant's cellmate for a period of time, testified that Steve Fridella argued with appellant and that Chris, who was present in the room, became frightened. (R 1440) Chris was separated from his father immediately following the confrontation with appellant. (R 1441)

The evidence is clear that appellant was engaged in the commission of a kidnapping at the time of the murders. Although most cases under this subsection involve situations where the murder

victim is the subject of the kidnapping,[3] appellee's research reveals one case where the facts show otherwise. In Patrick v. State, 437 So.2d 1072 (Fla. 1983) the defendant took hostages and killed a police officer who attempted to rescue the victims. The defendant was convicted of first-degree murder of the police officer and this court upheld a finding by the trial court that the murder was committed while the defendant was engaged in the commission of a kidnapping. According to the Fitzpatrick case, the aggravating circumstance of subsection (5)(d) was properly applied to the facts of this case where the murder victim was not the subject of the kidnapping.

Appellant's suggestion that a finding on this aggravating circumstance is improper because the defendant was not charged with the substantive offense of kidnapping is without merit. Although most cases relying on this aggravating factor do involve kidnapping charges,[4] this court in Stevens v. State, 419 So.2d 1058 (Fla. 1982), upheld a finding of this aggravating circumstance even though the defendant had not been charged with kidnapping Stevens and a co-defendant were indicted for one count of first-degree murder. The evidence produced at trial established that the vicitm, a convenience store clerk, was robbed, abducted, raped and killed. This

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[3] See e.g., Preston v. State, 444 So.2d 939 (Fla. 1984); Card v. State, 453 So.2d 17 (Fla. 1984); Squires v. State, 450 So.2d 208 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983); Justus v. State, 438 So.2d 358 (Fla. 1983); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

[4] Atkins v. State, 452 So.2d 529 (Fla. 1984); Preston v. State, 444 So.2d 939 (Fla. 1984); Justus v. State, 438 So.2d 358 (Fla. 1983).

court upheld a finding that the murder occurred during the commission of a kidnapping. Thus, the failure to charge appellant with the crime of kidnapping did not preclude the trial court from relying upon evidence of the kidnapping (presented during both phases of the trial) as an aggravating circumstance.

ISSUE III

THE TRIAL COURT DID NOT ERR IN FINDING, AS AN AGGRAVATING FACTOR, THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST.

The third aggravating circumstance found by the court was §921.141(5)(e), the capital felony was committed to avoid arrest or to effect an escape from custody. The trial judge found that one of the victim's recognition of J. D. Walton was partly responsible for the triple slaying. (R 245) The record supports this finding. (R 917)

This court has consistently upheld a finding of this aggravating circumstance where there is evidence in the record, such as here, that the victim knew and could have identified the defendant or one of the assailants. See e.g., Adams v. State, 412 So.2d 850 (Fla. 1982); Card v. State, 453 So.2d 17 (Fla. 1984); Vaught v. State, 410 So.2d 147 (Fla. 1982). The finding that the capital felony was committed for the purpose of avoiding or preventing arrest and prosecution is supported by the evidence that the shooting was percipitated by one of the victim's announcement that he recognized one of the masked assailants. The trial court did not err in finding this aggravating circumstance.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The fourth aggravating circumstance found by the court was §921.141(5)(h), the capital felony was especially heinous, atrocious or cruel. The trial judge stated with reference to this aggravating circumstance:

> FINDING: The victims were laid face down on the floor by masked intruders. All victims were conscious having been aroused in the middle of the night from their sleep. Their hands were bound. They were in helpless condition and while alive they were made aware of the decision to kill, and were killed. Certainly, the victims were in a position of horror, fear and terror prior to death. Anything the victims might do to resist would certainly in their minds endanger the eight year old. The evidence clearly reveals that although the victim FRIDELLA already was fatally wounded, was still struggling, the Defendant returned to deliver a coupe de grace in the form of a shotgun blast. However, this was not the traditional stroke of mercy to end suffering, but to be certain that the victim would be silenced and the crime would be complete. Further, there was not one person executed, but three persons mercilessly slaughtered in which butchery the Defendant substantially participated.

(R 246)

The events surrounding the slaying in this case readily distinguish it from the slayings which occurred in Maggard v. State, 399 So.2d 973 (Fla. 1981) and Williams v. State, 386 So2.d 538 (Fla. 1980), cited by appellant. The victims in those cases were not aware that they were going to be shot.

This aggravating circumstance contemplates the consciencless, pitiless or unnecessaryily torturous crime which is accompanied by

such additional acts as to set it apart from the norm of capital felonies. Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 US. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); 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). In Cooper, the defendant shot his victim immediately upon confronting him. The victim died instantly and painlessly, without any additional acts which made the killing heinous within the meaning of the statute. In contrast, the three victims in this case were hearded into the living room, bound, and forced to lie face down on the floor while one of the intruders ransacked the house. The victims were undoubtedly made aware of the decision to kill since the record shows that a gun pointed at the head of one of the victims misfired three times. (R 925, 1443)

This case is most like the execution-style slaying which this court considered in White v. State, 403 So.2d 331 (Fla. 1981). In White the eight victims were shot execution-style in the back of the head. In upholding the trial judge's finding of heinous, atrocious or cruel, this court said:

> The calculated slaughter of six individuals and attempted slaughter of two others constitutes an atrocity which sets the capital felonies apart from the "norm" of capital felonies. Even one of the co-felons characterized the episode as "the St. Valentine's Day Massacre."

(403 So.2d 331)

Crucial to a finding of this aggravating circumstance is a showing that the victim was aware of his impenadindg death. See Clark v. State, 443 So.2d 973, 977 (Fla. 1983), cert. denied, __ U.S __, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). In this case, in

addition to testimony that Walton's gun misfired three times when he attempted to shoot the first victim, Steve Fridella, there is also evidence that Fridella pleaded for his life before he was killed. (R 1444) Compare, Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984) (victim forced to submit to sexual relations with defendant prior to her death, while pleading for her life).

The events surrounding the slayings in this case were accompanied by such additional acts as to set it apart from the norm of capital felonies. The trial judge did not err in finding the applicability of this aggravating circumstance.

Citing Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), appellant argues that the trial court gave improper double consideration to a single circumstance by citing that appellant had previously been convicted of a capital felony and that the capital felony was especially heinous, atrocious or cruel. The principle of Provence is not applicable here. In Provence this court held that proof that a capital felony was committed during the course of a robbery necessarily was based on the same aspect of the crime that provided the bases for finding the motive of pecuniary gain. The same reasoning does not apply to the two aggravating circumstances cited by appellant. The previous conviction and the heinousness of the crime are separate characteristics not based on the same essential facts. Thus, there was no improper doubling of aggravating circumstances. Compare Waterhouse v. State, 429 So.2d 301 (Fla. 1983)(previous conviction and parole statuts are distinct characteristics based on different facts).

ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The fifth aggravating circumstance found by the court was §921.141(5)(i), the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial judge stated with reference to this aggravating circumstance:

> FINDING: The Defendant traveled a substantial distance armed and prepared to do violence and murder; the only reasonable inference being that a minimum part of the overall plan was it might become necessary to kill. When it was decided that the victims would be killed, the Defendant fired initially three shotgun blasts and returned to fire a fourth into FRIDELLA who was able to raise up before the last shot. There was premeditation upon premeditation. There was certainly plenty of time for reflection and plenty of time for premeditation; murder being considered as an obvous possiblity in the minimum overall plan. There was certainly no pretense of any moral or legal justification.
>
> It is the Court's finding that each one of the aggravating circumstances alone is sufficent and there are no mitigating cirumstances esatablished by the Defendant. The penalty of death is appropriate when each of the aggravating circumstances are considered separately and of course where jointly considered the death penalty remains appropriate.
>
> The Court in enunciating the aggravating circumstances has considerded the evidence most favorable to the Defendant, though not necesary to the conclusion herein. It is, however, this Court's further finding that to and beyond every reasonable doubt the intial plan was to assassinate and execute the victims. This is borne out by the fact that JASON D. WALTON increased the volume of the televison set; there was no attempt to bind the legs of the vicitms and that the boy was segregated immediately. It is clear

> that there was no attempt on the part of JASON D. WALTON to disguise his voice and that he faced the initial risk of being recognized in spite of the mask. This Court finds that the death and execution of each of the victims was coldly planned, premeditated and calculated prior to their entry into the premises, in spite of the partly exculpatory statements attributed to the malefactors hearin.

(R 246 - 247)

This aggravating factor requries a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder. Hardwick v. State, 461 So.2d 79 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied., __ U.S. __, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); 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). This court has previously applied this aggravating circumstance to those murders which are characterized as execution by contract murders or witness elimination murders. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). See e.g., Menendez v. State, 419 So.2d 3121 (Fla. 1982); McCray v. State, 416 So.2d 804 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 72 L.Ed.2d 862 (1982).

In the instant case, the record reflects that appellant shot Steve Fridella once and then ran from the house. When Walton discovered that the victim was still alive he called to appellant and appellant returned to the house and shot the victim once again in the head. (R 925 - 926) In addition, there was also testimony elicited during the sentencing phase of the trial that appellant reloaded his gun before returning to the house. (R 1446) The facts of this case are sufficient to show the heightened premeditation required

for the application of this aggravating circumstance as it has been defined in McCray, Jent and Combs.

This court held in Hardwick v. State, 461 So.2d 79 (Fla. 1984) that the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. The evidence in Hardwick established that the defendant intended to rob the victim and that once he began to choke her, it would have taken more than a minute for her to die. Citing Gorham v. State, 454 So.2d 556 (Fla. 1984), the court said the fact that a robbery was planned is irrelevant to the issue of premeditation. The court went on to explain that the aggravating factor of premeditation "emphasizes cold calculation before the murder itself". Id at 81. Evidence that appellant reloaded his gun before shooting the victim a second time was sufficient to establish "calculation before the murder." Hardwick, supra.

On facts similar to those presented here, this court upheld a finding of premeditation as an aggravating factor in Squires v. State, 450 So.2d 208, 212 (Fla. 1984). Squires shot the vicitm four times in the head with a revolver after having initially wounded the man with a shotgun. In the instant case, appellant wounded the victim, reloaded the gun, and shot the victim again. Based on Squires, the trial court's finding that the murder was committed in a cold, calculating, and premeditated fashion was not improper.

In Caruthers v. State, __ So.2d __ (Fla. Case No. 64,114, opinion filed, Feb. 7, 1985)[10 F.L.W. 114], cited by appellant, this court held that the trial judge erred in finding that the murder was committed for the purpose of avoiding arrest and that the capital

felony was premeditated. In that case, unlike here, there was no evidence of heightened premeditation. The trial judge based his conclusions as to the existence of both aggravating factors upon the fact that the victim knew the defendant. In the instant case, in addition to evidence that the victim knew one of the assailants, there is also evidence that appellant reloaded his gun, returned to the house, and shot the victim a second time after having initially wounded him. Unlike Caruthers, the trial judge in this case did not base his conclusion as to the existence of both aggravating factors upon the same facts.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND, AS A MITIGATING CIRCUMSTANCE, THAT APPELLANT COULD NOT APPRECIATE THE CRIMINALITY OF HIS CONDUCT.

In sentencing appellant to death the trial court found no mitigating circumstances. The jury was instructed on three mitigating circumstances: (1) whether the defendant acted under extreme duress or under the substantial domination of another person, §921.141 (6)(e); (2) the age of the defendant at the time of the crime, §921.141(6)(g), and (3) any other aspect of the defendant's character and any other circumstance of the offense. (R 1607) The sentencing order discusses each of these factors. (R 247 - 248)

Appellant contends that the trial judge should have found that his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. Section 921.141(6)(f). Appellant, however, never argued this mitigating factor to the jury. (R 1599 - 1602) Nor did he object when the trial judge failed to give an instruction on this mitigating circumstance. (R 1607, 1610) Compare, Hall v. State, 403 So.2d 1324, 1325 (Fla. 1981) (defense counsel failed to argrue the mitigating circumstance of diminished capacity). This court held in Johnson v. State, 438 So.2d 774, 779 (Fla 1983) that mitigating circumstances can be waived. We submit that the failure to argue this mitigating circumstance to the jury, coupled with counsel's failure to object to the instructions given during the penalty phase of the trial, constitutes a waiver of this mitigating circumstance.

There was testimony presented during the guilt phase of the

trial that appellant had been drinking on the day of the murders but was not intoxicated. (R 929) In addition, counsel argued to the jury during the guilt phase that appellant was acting with a depraved mind because of his use of drugs and alcohol. (R 1228) This court held in Simmons v. State, 419 So2.d 316, 319 (Fla. 1982), that evidence of alcohol and marijuana use on the night of the murder did not compel a finding of this mitigating circumstance. Moreover, this curt has consistently held that it lies within the province of the trier of fact to weigh the evidence presented. Smith v. State, 407 So.2d 894, 903 (Fla. 1981); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). The judge and the jury heard the testimony and apparently concluded that the testimony should be given little or no weight in their decisions. This court should not disturb that finding.

ISSUE VII

OBJECTIONS TO QUESTIONS NOT PRESENTED TO THE TRIAL COURT CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL. (Restated)

Appellant argues that the State, over defense objection, elicited testimony from a prosecutor witness, Paul Skalnik, that appellant planned to present testimony from psychiatrists. Citing Maggard v. State, 399 So2.d 973 (Fla. 1981), appellant submits that he should not have been forced to choose between presenting psychiatric testimony or not presenting it and having the jury draw an unfavorable inference from his failure to do so.

From the outset, we take issue with appellant's claim that he objected to this aspect of Skalnik's testimony. During the penalty phase of the trial, Skalnik testified as follows:

> Q. (States' Attorney) Specifically as to the doctors did he indicate they were going to have a doctor testify?
>
> A. A couple of psychiatrists, yes, sir.
>
> Q. Did he ever discuss with you what he thought his chances were of receiving the death penalty?
>
> A. Yes, sir, he did.
>
> Q. What did he say, sir?
>
> Mr. Koch: Judge, excuse me, I'm going to object. I think this is irrelevant. It's a proceeding beyond the grounds the Court said earlier.
>
> THE COURT: Counsel approach the bench.

(R 1449)

Defense counsel argued during a sidebar that Skalnik's testimony that appellant told him he would not receive the death penalty because of his young age was irrelevant. (R 1449 -1450)

The record is clear that appellant's objection was not directed to the question now argued on appeal. Objections to questions not raised in the trial court cannot be considered for the first time on appeal. Sims v. State, 54 Fla. 100, 44 So. 737 (1907); Brown v. State, 46 Fla. 159, 35 So. 82 (1903).

In Maggard v. State, supra, cited by appellant, the State, over defense objection, was allowed to present extensive evidence of Maggard's prior criminal record of nonviolent offenses. This evidence was introduced to rebut a mitigating circumstance, prior criminal activity which Maggard had expressly stated he would not rely on. Id. at 97. This court ruled that the State should not have been allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant had expressly waived reliance upon. The court further ruled that the jury should not be advised of the defendant's waiver. Id. at 978. The facts of this case are distinguishable from Maggard. Appellant did not waive reliance on any mitigating factor, and the State did not offer evidence to rebut a mitigating factor which had been expressly waived by the defense.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND APPELLANT'S AGE AT THE TIME OF THE OFFENSE AS A MITIGATING CIRCUMSTANCE.

At the time of this offense appellant was eighteen years of age. The trial court rejected age as a mitigating factor. (R 248)

This court said in Peek v. State, 395 So.2d 492, 498 (Fla.), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), that there is "no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." This court concluded in Peek that the trial court's rejection of age twenty as a mitigating factor was supported by the evidence. See also, Daugherty v. State, 419 So.2d 1067 (Fla. 1982)(relying on Peek, defendant's age of twenty rejected as a mitigating circumstance).

In the instant case, appellant's mother testified that appellant has lived on his own since he was sixteen years old, following the death of his father. (R 1474 - 1476) There was also testimony that appellant told a cellmate he would not receive the death penalty because of his young age. (R 1452) The court did not err in rejecting the mitigating factor of age under the particular circumstances of this case.

CONCLUSION

For the reasons and authority cited herein, appellee respectfully requests that this Court affirm the judgment and sentences of death.

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 U.S. Regular Mail to John E. Swisher and Robert H. Dillinger, DILINGER & SWISHER, P.A., 5511 Central Avenue, St. Petersburt, Florida 33710, this 22nd day of April, 1985.

Theda James Davis
OF COUNSEL FOR APPELLEE.