IN THE SUPREME COURT OF FLORIDA

DAVID ALLEN GORE,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Case No. 65,201

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the criminal division of the circuit court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. The parties will be referred to as they appear before this court.

The symbol "R" will denote the record on appeal. All emphasis in this brief is supplied by appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

STATEMENT OF THE FACTS

Appellee cannot accept the statement of facts made in appellant's initial brief. Therefore, the following statement of facts is made in a light most favorable to upholding the judgment and sentence below.

Regan Alexandria Martin and Lynn Elliott decided to hitchhike to the beach and were picked up by two men in a four-wheel drive pickup truck (R 1778, 1780). The glove compartment of the pickup truck snapped open and a gun became visible. The passenger, identified as appellant, held the gun to Regan's head, and grabbed the two girls' wrists and held them together (R 1782). Gore then said let's take these girls home (R 1783). At the same time, Gore told the two girls that if they said or did anything they would be killed. The two girls were ordered to put their heads down, and when they next were able to put their heads up, they were stopped at a house (R 1785, 1786). Their wrists were handcuffed, and they were taken to a bedroom in the home. Gore then acquired a knife from the kitchen, and separated the two girls, tying Lynn up, and putting the handcuffs on Regan. At this time, Regan testified that she was sexually assaulted (R 1799). Regan heard noises from the other room, when Gore had left her. Gore told Regan to be quiet or he would slit her throat, and then he stated he was going to slit her throat anyway (R 1801). Regan was then forced into a closet in the home, and after Gore had left, she heard two or three shots (R 1803). Later Gore put Regan in the attic and Regan heard voices calling Gore. Gore then left Regan and the next thing Regan saw was a police officer who helped her down from the attic.

Michael Rock, was riding his bicycle in the area of Gore's home, and heard screaming (R 1963). He looked towards the screaming, and saw a girl and a man chasing her down a driveway. Neither were wearing clothing. The man caught up to the girl, and dragged her back to a palm tree, and shot her as she laid on the ground (R 1965). Michael Rock heard two shots and testified by demonstrating that the perpetrator used a left hand to brace the right hand (R 1980). The witness immediately returned home and told his mother. At a live lineup, Michael Rock picked number three, appellant, as the killer (R 1985). He further identified appellant in open court as the killer (R 1988).

Various witnesses from AT & T testified concerning the workings of the 911 emergency system. Their testimony reflected that when a call is made to the 911 number, the number making the call appears on a computer screen. Further, the computer looks up the address of the calling number and that flashes on the screen within two seconds.

Mary Lenz, a deputy with the Indian River Sheriff's Department, testified that a call came in to 911 on the day of the murder, from phone number 562-6689, and the address of Alva Gore appeared on the screen. Sherrie Douberly, a 911 operator, testified that she received a call from 562-6689, and the caller said a female had been wounded and that there was screaming coming from a nearby area (R 2107). An official from Southern Bell identified 562-6689, as a phone number assigned to Gore's residence. Phil Redstone, a deputy sheriff, testified that he was outside Gore's residence at 4:02 p.m. This corresponded to the time that the

phone calls were placed from that residence.

Roy Raymond, Chief Deputy Sheriff, testified that he saw a car in Gore's garage, and there was blood on the garage floor dripping from the trunk of the car (R 2153).

Perry Pisani, a detective with the Indian River Sheriff's Department, stated that when the 911 call was received, the officers had surrounded the house of appellant. This gave the officers cause to believe that appellant was still in the home. Jerry Fitzgerald, testified that he seized a gun from defendant's residence (R 2186). Further, he found wire in the master bedroom, consistent with the wire used to bind the victims.

Dr. John Roberts performed an autopsy on Lynn Elliott (R 2327). He testified that he cut rope from her arms and legs. Further, he retrieved metal fragments taken from gunshot wounds to her head. There were multiple abraisons on Lynn's body consistent with falling and being dragged (R 2352). Her arms were very tightly bound, and she received a painful blister from the tight bindings.

Anthony Laurito, a crime lab technician, testified that one of the bullet fragments recovered from the body of Lynn Elliott could be used for comparison purposes. He further testified that the bullet fragment was fired from the gun found in appellant's residence (R 2401).

Daniel Nippes, a crime lab technician, examined Gore's pants, and found seminal fluid and saliva deposited therein (R 2445). This sample contained fluids which were indicative of two different blood types: A and B (R 2445). He further testified

that both Lynn Elliott, and appellant, were secretors. That is, appellant secretes indicators into body fluids which would type his blood as B, and Lynn Elliott secreted type A indicators into her body fluids. Nippes also testified that he found type A and B secretions in the vaginal swabs taken from Lynn Elliott (R 2449). Further, he testified that hair samples taken from appellant's shirt were consistent with Lynn Elliott's hair (R 2449). When the evidence technician examined the pants of Gore, he found three live rounds of .22 caliber amunition in the pocket. He further testified that these bullets were stamped with a C on the end (R 2474). Nippes examined the shells in the pistol recovered from Gore's house, and testified that they all have this same C marking (R 2474). Lastly, Nippes testified that Waterfield is not a secretor of indicators of a B bloodtype (R 2446).

John Matthews, an instructor at the police academy, testified that appellant completed a course as an auxiliary police officer which included instruction in criminal law and firearms handling (R 2483).

Sidney DuBose took defendant's statement on the day of the murder. Defendant was advised of his Miranda rights, and consented to speaking to DuBose without an attorney (R 2504). The tape of Gore's statement was then played to the jury. Gore admitted picking up the girls and forcing them to return with him to the house (R 2551). He also admitted chasing the girl down the driveway (R 2560). The state rested.

The defense called Dr. Joseph Davis to testify that the rope marks found on Lynn Elliott were more pronounced since the rope was left on Lynn after her death (R 2628).

James M. Smith, a civil engineer, testified that he measured the distance from the palm tree where the murder occurred, to the observation point of Michael Rock, and determined that it was 356 feet (R 2676).

Donald Coleman, a detective with the Indian River County Sheriff's Department, went to Fred's 4 By 4, and spoke to Fred Waterfield. George Stokes, also testified to the fact that he went to Fred's 4 By 4 and saw the black four-wheel drive pickup truck and Fred Waterfield, on the day the murder occurred (R 2706). Stokes testified that Waterfield told him that he had helped appellant out of the sand earlier in the day and further said that he would kill appellant if he got him in trouble (R 2741).

After closing arguments, the jury returned guilty verdicts on all charges.

POINTS ON APPEAL

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SUMMARY OF THE ARGUMENT

1. An examination of the transcript of voir dire shows that the jurors agreed they would follow the law as instructed by the Court. The appellant has not preserved for review the question of whether it was error to disallow the question concerning the co-defendant.

2. The trial court correctly denied the motion to suppress the appellant's statement, having found it was voluntarily made. The appellant waived his right to counsel.

3. The two photographs of the victim's body were properly admitted into evidence because they were relevant to issues at the trial.

4. The trial court's ruling refusing to allow a demonstration of the distance of 356 feet in downtown St. Petersburg was within its discretion.

5. The appellant's failure to lay a predicate for introduction of a prior inconsistent statement was a valid ground supporting the trial court's ruling disallowing the testimony of a witness concerning the statement.

6. The trial court did not err in denying the appellant's motion for mistrial, because Detective Kuehn properly testified about the appellant's responses to the Miranda warnings.

7. The jury selection process was in accordance with Witherspoon v. Illinois, 391 U.S. 510 (1968). The appellant has failed to show the court erred in its rulings in this regard.

8. The prosecutor did not engage in misconduct. His single reference to the victim's parents was not prejudicial, and there was no discovery violation concerning the bullets in the trouser pocket.

9. Florida's death penalty statute is constitutional. The appellant's arguments to the contrary have previously been rejected by this Court and the Federal courts.

10. The evidence of appellant's guilt, which included an eyewitness identification, was strong; hence, the trial court did not err in denying his motions for acquittal, to preclude the death penalty, and for new trial.

11. The appellant was adequately notified by the statute of the applicable aggravating circumstances; the state did not have to furnish him with a separate list prior to trial.

12. The trial court did not err in failing to direct a verdict of life - see Points 10 and 17.

13. Enmund v. Florida, 458 U.S. 782 (1982) does not require imposition of a life sentence in this case, since the evidence showed the appellant personally committed the murder.

14. The trial court properly instructed the jury during the sentencing phase of the trial in accordance with the applicable law.

15. The curative instruction given by the court when a juror had a slight seizure was adequate to cure any prejudice and the defense motion for mistrial was properly denied.

16. The trial court correctly sustained the state's objection to an incorrect statement of the law made by defense counsel during closing argument in the penalty phase. Counsel should not be permitted to misstate the law, for this would confuse the jury and might cause them to disregard the legal instructions given by the court.

17. The death penalty was appropriate in the appellant's case. The evidence sufficiently supports the aggravating factor that the crime was committed to avoid arrest because it was committed when the sexual battery victim attempted to escape from the premises where the appellant had confined her. Had she escaped, she would have been able to report the sexual battery to the police and also to get help for her friend who was still confined in the house. Likewise, the evidence showed the murder was heinous, atrocious and cruel. The victim was kidnapped, bound, sexually battered, and murdered as she was trying to escape. Even if this Court reduces the number of aggravating circumstances, the death sentence should still be affirmed since there are no mitigating factors. The factor that the murder was committed in a cold and calculated manner without any pretense of moral or legal justification is supported by the evidence that the victim was slain execution style and the appellant threatened the surviving witness with death.

As to mitigating factors, the appellant's prior conviction supports the trial court's finding that the appellant did not have an insignificant criminal history. There was no evidence to show that the appellant lacked the capacity to appreciate the criminality of his acts.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY SUSTAINED THE STATE'S OBJECTIONS TO TWO QUESTIONS POSED BY APPELLEE ON VOIR DIRE OF THE JURY.

Appellee will deal with issues 1 and 25 of appellant's brief in a consolidated manner since they both concern the scope of voir dire examination.

Appellant first alleges that the trial court committed reversible error in failing to allow him to question the prospective jury concerning those persons unalterably in favor of the death penalty. For this proposition, appellant cites Poole v. State, 194 So.2d 903 (Fla. 1967), and Thomas v. State, 403 So.2d 372 (Fla. 1981).

In Thomas, this Court reversed the conviction and ordered a new trial when it was shown that a juror sitting on defendant's jury was unalterably in favor of imposing the death penalty without regard to the law given to him by the trial court. Certainly, when a juror indicates that he will not follow the law as given to him by the trial court, there is grave concern for the fairness of the trial. However, in the instant case, there was never any hint that any juror would be unable to follow the law as given to him by the trial court. The distinction is, of course, that the juror in question in Thomas clearly stated on the record that he would not follow the laws given to him.

It is interesting to note that the state attorney questioned the jury concerning their attitudes towards the death penalty as follows:

> MR. STONE: Okay. Let me ask those of you who believe in the death penalty

> as an alternative, do you believe that it should just automatically be imposed or would you follow the court's instructions and make sure that the circumstances would prove it before you would consider it? Would you? (R 1573).

No juror indicated that he would put aside the judge's instruction. Since the juror's response to that question did not indicate a bias towards the death penalty, this Court's decision in Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), not Thomas, supra, should be applied. In Fitzpatrick, this Court stated:

> In this case none of the four veniremen ever indicated that he was unalterably opposed to recommending life sentences for convicted murders. Their statements only indicated a tendency toward being in favor of the death penalty. 'A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror.' Witherspoon v. Illinos [citation omitted] [emphasis supplied] at page 1075.

Clearly, the jury was repeatedly asked whether they could follow the law as given to them. Since appellant cannot show that his jury was made up of one or more persons unalterably in favor of the death penalty, no error appears.

Concerning the second issue relating to voir dire, the state would note that there was never an objection made to the disallowance of the question concerning co-defendant Waterfield. In Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court has held that acquiescence in the court's ruling is a failure to preserve the issue for appellate review.

> This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. Under the circumstances, the trial judge was not required to make further inquiries. Lucas at page 1152.

Appellant asked the objected to question, the court sustained the state's objection, and appellant said nothing further. Appellant has therefore failed to preserve this issue for appellate review.

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS.

Appellant charges that the trial court erred in two respects: first, that the court improperly denied his motion to suppress, and secondly, that in denying the motion, the court made an insufficient finding. Appellant is mistaken as to both issues. In order to show that the trial court made an appropriate ruling the state will show the finding which was made by the trial court thus rebutting appellant's second contention.

> THE COURT: ...and the evidence is that he was an auxiliary police officer. That he had education, experience with reference to arrest etc. Whether or not he made an intelligent waiver of his right to counsel during his statement, in the court's opinion he was given Miranda at the Indian River County Jail, and he stated that he did wish to proceed without a lawyer and did proceed and did intelligently answer the questions. And it was only after some more incriminating statements were beginning to be asked that he at that time asked for counsel and stated I believe he did not want to proceed further without counsel and the interrogation did, of course, cease. So, the motion to suppress the statement will be denied, and it would be denied during this course of the trial. (R 1364-1365)
>
> * * *
>
> THE COURT: Well, let me make my ruling specific so there would be no misunderstanding of what I am doing. I am stating that there was an intelligent waiver of the right of counsel, intelligently done at the Indian River County Jail wherein Mr. Gore specifically stated after Miranda that he wished to proceed without counsel. (R 1369-1370).

In making his ruling, the trial court cited to Cannady v. State, 427 So.2d 723 (Fla. 1983), which is also cited by appellant in his initial brief. Under appellant's interpretation of the evidence, defendant stated in a confusing fashion that he wanted a lawyer and the police officers were thus required to clarify this intention before asking further questions. Instead, the facts show that when first arrested appellant said "I want to get something off my chest and then see a lawyer." (R 1222). When appellant reached the police station to "get something off my chest" he was again given Miranda warnings as reflected by the taped statement. Appellant voluntarily made the remarks. At one point, he said that he then wished to speak to a lawyer. It is conceded that anything said after that request was appropriately suppressible. But the statements made before that time are fully admissible.

It was not the duty of the arresting officer to convince defendant that he wants an attorney. State v. Craig, 237 So.2d 737 (Fla. 1970), Palmes v. State, 397 So.2d 649 (Fla. 1981). As the trial court found, appellant had knowledge and training which gave him a full understanding of the rights available to him. His experience as an auxiliary deputy sheriff certainly gave him exposure to "Miranda" warnings, and their import.

Edwards v. Arizona, 451 U.S. 477 (1981), is not violated by the admission of this confession simply because at no time did appellant indicate that he wanted to speak to an attorney before he "got something off his chest."

Appellant's claim that the trial court made insufficient findings of voluntariness under Peterson v. State, 372 So.2d 1017

(Fla. 1979), is meritless. This court in Peterson held,

> The effect of the cases discussed above is not that a simple denial of suppression by the judge is an inadequate finding, but that if such a general denial is made, the record of the proceedings must disclose that the ruling was based on a finding by the judge that the confession was voluntary. At page 1020.

The above quoted language in the trial court's finding satisfies the Peterson standard as well as being legally sufficient for the finding of voluntary confession.

POINT III

THE TRIAL COURT PROPERLY ALLOWED NECESSARY GRUESOME PHOTOGRAPHS INTO EVIDENCE.

Appellant alleges that the trial court improperly allowed the admission of two unfairly prejudicial photos: State's Exhibit 5 showing the body of the victim in the trunk of the car, and State's Exhibit 10 showing the hands of the victim tied behind her back (R 829).

Both of these photos were admitted as relevant and after each was admitted the judge gave a cautionary instruction (R 2168, 2205). This court has stated:

> [T]he current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in a normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumulative,' or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence.

State v. Wright, 265 So.2d 361, 362 (Fla. 1972). See also Bush v. State, ___ So.2d ___, (Case No. 62,947 decided November 29, 1984), and cases cited therein.

State's Exhibit 5 was relevant for two reasons. First, it placed the body of the victim in appellant's father's car, access to which arguably Waterfield would not have had. Secondly, number 5 showed the condition of the body when it was first discovered by police officers (R 2164, 2165, 2347). Exhibit 10 showed that there was considerable pain inflicted by defendant in

binding the victim and also is consistent with demonstrating that when the victim was running and fell, she could not brace her fall, thus there were substantial further injuries from the fall (R 2349, 2350).

Since these photos were relevant, they were admissible and no error appears below.

POINT IV

THE TRIAL COURT PROPERLY DISALLOWED APPELLANT'S REQUEST FOR A DEMONSTRATION, IN DOWNTOWN ST. PETERSBURG, OF THE DISTANCE OF 356 FEET.

During the course of the testimony of James M. Smith, a civil engineer, appellant attempted to provide a demonstration of the distance 356 feet by having that distance measured out in downtown St. Petersburg (R 2681). The state attorney objected on the ground that the area of St. Petersburg was quite different from the actual cite where Michael Rock observed the murder of Lynn Elliott.

Appellant now claims that the trial court's refusal to allow the demonstration was error. The state disagrees.

Distance is something within the ordinary knowledge of a juror. The average juror does not need to be shown that 356 feet is a substantial distance, but to take the jurors into the streets of St. Petersburg in order for them to test their powers of observation at 356 feet is unnecessary and irrelevant. The witness, Michael Rock, could be, and was, questioned concerning his distance from the murder. The disallowance of this demonstration is within the discretion of the trial court, and no abuse occurred below.

In Stevens v. State, 419 So.2d 1058, (Fla. 1982), defendant asked the trial court to allow him to drink two cases of beer in order to demonstrate his state of intoxication at the time he gave his confession. This court held that the trial court did not abuse its discretion in refusing to allow the demonstration. In Stevens, this court stated:

> The admisibility of a test or experiment lies within the discretion of the trial judge. Reid v. State, 68 Fla. 105, 66 So. 725 (1914); Hisler v. State, 52 Fla. 30, 42 So. 692 (1906). A court should admit evidence of scientific tests and experiments only if the reliability of the results are widely recognized and accepted among scientists. Rodriguez v. State, 327 So.2d 903 (Fla. 3rd DCA), cert. denied, 336 So. 2d 1184 (Fla. 1976); Coppolino v. State, 223 So.2d 68 (Fla. 2nd DCA 1968), appeal dismissed, 234 So.2d 120 (Fla. 1969), cert. denied, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970); 3 S. Gard, Jones on Evidence, Section 15: 9 (6th Edition 1972). At page 1063.

There is nothing to indicate that the sunlight or weather conditions would be duplicated by the experiment in St. Petersburg. There is further nothing to show that the jury's eyesight would be comparable to that of the 15 year old witness, Michael Rock. In short, there is nothing to indicate that the experiment would provide reliable results. It was therefore properly disallowed.

POINT V

THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE TESTIMONY OF MR. PISANI CONCERNING THE OUT-OF-COURT STATEMENT OF MICHAEL ROCK.

Appellant alleges in his Issue 12, that the trial court committed error in refusing to allow the testimony of Mr. Pisani, concerning the out-of-court statements given by Michael Rock. For this proposition appellant cites no case which holds that the state had violated his right to confront a witness by the disallowance of this testimony. The reason is, of course, that appellant is unable to find such a case.

Michael Rock gave his description of appellant during cross examination (R 1991). It included the testimony concerning the mustache. At that time, appellant chose not to ask Michael Rock about any inconsistent statements which he made on the day of the murder to Mr. Pisani. He could have done so, but he did not. His failure to do so caused a fatal lack of predicate for the subsequent "impeachment" by Mr. Pisani's testimony. The state would submit that the statements are not inconsistent, but had a proper predicant been made, appellant could have attempted to demonstrate an inconsistency. § 90.614(2) Fla.Stats., states:

> Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. (Emphasis ours)

Since appellant chose not to question Michael Rock during cross-examination, he is unable to admit the extrinsic evidence of a prior inconsistent statement. Thus it was not error for the trial court to refuse the testimony of Pisani concerning a prior statement of Rock.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHICH WAS GROUNDED UPON CERTAIN STATEMENTS MADE BY DETECTIVE KHEUN.

Appellant argues that the testimony of Detective Kheun concerning appellant's statement in response to Miranda warnings, warranted the granting of a motion for mistrial. Those statements are as follows:

> Q. What did David Allen Gore state regarding a lawyer after you read him -- what was the last question, do you want a lawyer now?
>
> A. Do you wish to talk to us now without a lawyer.
>
> Q. What did he say?
>
> A. He said that he wanted to get something off his chest, to make a statement, and then he wanted to see a lawyer. (R 2268)

The state's question was not designed to elicit the "get something off his chest," language. The detective was attempting to make a complete answer and the language was placed before the jury. As this court stated in Ferguson v. State, 417 So.2d 639 (Fla. 1982):

> A motion for mistrial is addressed to the sound discretion of the trial judge and 'the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity.'

Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert.denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (citations omitted). At page 641.

In denying the motion for mistrial, the trial court held that since it was the jury's duty to determine the voluntariness of defendant's statements based upon a totality of the circumstances, even though Miranda warnings were again given at the police station before a statement was taken, the evidence of Miranda warnings and answers thereto at the scene, were admissible (R 2273, 2274). It is therefore clear that the state appropriately introduced answers to Miranda warnings given at the scene and the motion for mistrial was properly denied.

POINT VII

THE JURY SELECTION PROCESS APPROVED BY THE UNITED STATES SUPREME COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510, (1968), DID NOT CAUSE AN IMPROPERLY DRAWN JURY.

In Issues 20 and 21, consolidated here for the purposes of the state's answer, appellant maintains that the jury selection process approved by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, (1968), caused an improperly drawn jury, and also he was denied the public funds necessary to provide a witness and transcript of Grigsby v. Mabry, 569 F.Sup. 1273 (E.D. Ark. 1983). Appellant is mistaken in both instances.

The jury selection process utilized below complied in every respect with Witherspoon. This court has rejected the contention that a "death qualified" jury is prosecution prone. Maggard v. State, 399 So.2d 973 (Fla. 1981), Riley v. State, 366

So.2d 19 (Fla. 1979). Appellant actually makes two arguments concerning the jury selection process. The first is based on Grigsby v. Mabry, supra, and the second is that the process itself of asking jurors questions about the death penalty causes jury bias.

Appellant's reliance on the decision in Grigsby v. Mabry, supra, is misplaced since said decision has been questioned and rejected in the federal appellate circuit in which it arose. See Hutchins v. Woodard, 730 F.2d 953, (5th Cir. 1984), application for vacation of stay granted, ___ U.S. ___, ___ S.Ct. ___, 78 L.Ed.2d 977 (1984); Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983), and has been previously decided by the Fifth Circuit in Florida in a contrary manner, in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), and Riley, supra.

Concerning the second issue raised by appellant, the question becomes, if the collective questioning of the jury panel influences the jury, why wouldn't the individual questioning of each prospective juror also cause prejudice? The single case cited by appellant, Hovey v. Superior Court of Alameda County, 616 P.2d 1301 (Cal. 1980), answers the question by saying that less actual discussion of the death penalty is heard by each juror thereby causing less prejudice. Given the fact that Witherspoon allows such questioning, and also given the fact that no Florida case supports appellant's theory, this Court should find appellant's motion for individual voir dire properly denied.

Since there was no error in the denial of appellant's motions above, there was clearly no error in failing to expend public funds so that experts or transcripts could be utilized in this argument.

Appellant cites no authority for his proposition that he was constitutionally entitled to such assistance. It has been held in Florida that the right of any witness to compensation by a governmental entity is purely and entirely dependent upon the creation of such entitlement in Florida by statute. Palm Beach County v. Rose, 347 So.2d 127 (Fla. 4th DCA 1977), quashed on other grounds, 361 So.2d 135 (Fla. 1978). Appellant has not based his right to authorization of payment upon any statutory authority in Florida, and therefore the trial court properly denied that motion.

POINT VIII

NO REVERSIBLE ERROR OCCURRED BELOW BY ANY ALLEGED PROSECUTORIAL MISCONDUCT.

Appellant alleges two distinct areas of prosecutorial misconduct. The first concernsstatements made during voir dire which allegedly were an attempt to elicit sympathy for the victim's family. The remark was made after the prosecutor told the prospective jurors that it was likely that defendant's mother would take the stand and testify to mitigating circumstance. The prosecutor then said:

> As I said, you understand, we cannot call in the penalty phase Mr. & Mrs. Elliott. We are prohibited from doing that. (R 1750)

Very recently this Court has examined far worse prosecutorial comments and found no error. See Bush v. State, ___ So. 2d ___, (Case No. 62,947, decided November 29, 1984). In Bush the prosecutor mentioned the fact that Thanksgiving was near at hand, and that the victim's family would be sitting down to dinner without the deceased but with the constant reminder of the de-

ceased since the identical twin of the victim would be sitting at the table.

This Courtheld that each case of prosecutorial comment must be considered on its individual merit. Further, this Court cited Teffeteller v. State, 439 So.2d 840 (Fla. 1983), as follows:

> Comments of counsel during the course of a trial are controlable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. [Citations omitted] At page 845.

Clearly there was no abuse of the court's discretion herein. The remarks were far less egregious than those found in Bush, supra.

Concerning the several bullets found in defendant's pants, it must be remembered that defense counsel was fully aware of their existence prior to trial. When the objection was originally made, the trial court was under the impression that there was no discovery of the bullets (R 2468). There was obviously no suprise to the defense in hearing that the bullets were in the pockets of the trousers. Since there was no discovery violation there could obviously have been no prosecutorial misconduct in failing to separately list the bullets on the crime laboratory report.

Neither of appellant's claims of alleged prosecutorial misconduct are meritorious.

POINT IX

THE FLORIDA DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL.

Appellant presents a laundry list of complaints about the Florida capital sentencing statute in a summary fashion, and appellee will respond to each argument in kind.

First, appellant's complaint that the capital sentencing scheme fails to provide adequate notice of aggravating circumstances upon which the state intends to rely has been rejected by this court. See Tafero v. State, 403 So.2d 355, 361 (Fla. 1981).

Secondly and thirdly, appellant's challenges to the constitutional nature of the murder and death penalty statutes have also been posed and rejected in prior cases. Those sections have withstood challenges, on the grounds of vagueness, in that the classifications of murder, according to the degree, have been held to be sufficiently specific in delineation. Haber v. State, 396 So.2d 707 (Fla. 1981); State v. Jefferson, 347 So.2d 427 (Fla. 1977); Alford v. State, 307 So.2d 433 (Fla. 1975), cert.denied, 428 U.S. 923 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Fourth, appellant's contention is based upon an alleged due process ground have also been rejected on the merits on the basis that the death penalty statutory circumstances are adequate limits on the sentencing court's discretion. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), at 817, 818; Spinkellink, supra, at 609, 610, 616; Proffit v. Wainwright, 428 U.S. 242 (1976); Alvord v. State, 322 So.2d 533 (Fla. 1975), at 540; Alford, supra at 444; Menendez v. State, 419 So.2d 312 (Fla. 1982).

Fifth, appellant claims that the Florida statute impermissibly shifts the burden of proof at sentencing, requiring appellant to show that the death penalty is not warranted. As will be explained in Issue 14, this court in Arrango v. State, 411 So.2d 172 (Fla. 1982), has stated that the burden does not shift in the penalty phase.

Sixth, appellant claims that the statute does not require the state to prove the aggravating circumstances beyond a reasonable doubt. The sentencing scheme of the Florida statute has been approved by the United States Supreme Court in Proffit v. Florida, 428 U.S. 242 (1976). It is further clear that appellant was not limited to the statutory mitigating circumstances; Lockett v. Ohio, 438 U.S. 586 (1978); Louis v. State, 398 So.2d 432 (Fla. 1981), at 438-439.

Seventh, execution by electrocution is not cruel and unusual punishment. See Spinkellink v. Wainwright, supra, at page 616.

Eighth and ninth, appellant claims that the statute is unconstitutional because it encompasses the felony murder doctrine. Appellant was found guilty of premeditated murder. Since the statute has applied to him does not include the felony murder rule, the issue is moot as to the appellant.

This Court has held that an indictment for premeditated murder is sufficient to charge felony murder. State v. Pinder, 395 So.2d 836, (Fla. 1979). Appellant's claim on this ground is meritless.

Finally, appellant alleged the statute is constitutionally infirm because this Court does not automatically review all first degree murder cases, but reviews only those first degree murder cases which result in the death sentence, and not those which result in the term of life imprisonment. Appellant's claim of arbitrariness on this basis was rejected by the United States Supreme Court in Proffit v. Florida, 428 U.S. 242 at page 259 note 16, (1976).

POINT X

THE TRIAL COURT DID NOT ERR IN DENYING HIS MOTION FOR JUDGMENT OF ACQUITTAL, MOTION FOR NEW TRIAL, AND MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY.

Appellant claims that the trial court erred in denying the motion for judgment of acquittal, motion for new trial, and a motion to preclude imposition of the death penalty.

All these were predicated upon appellant's theory that Waterfield had done the killing. This was not a reasonable hypothesis of the innocence, and the trial court properly denied these motions.

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

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

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

Furthermore, the test to be applied to a motion for judgment of acquittal by both trial and appellate courts is not whether the totality of the evidence, in the opinion of the court, fails to exclude every reasonable hypothesis of innocence, but whether a jury might reasonably so conclude. Jackson v. Virginia, 443 U.S. 307 (1979); Rose v. State, 425 So.2d 521 (Fla. 1982).

The state's evidence that appellant was the trigger man was strong. Michael Rock testified that he saw a man chasing a woman outside the house which was owned by Gore's parents. When the man caught the woman, he dragged her back to a palm tree and shot her as she lay on the ground. Rock identified appellant in a lineup and an open court as the man who shot the girl. In appellant's own voluntary statement he admits chasing the girl down the driveway. Waterfield left the area before appellant started sexually assulting the two victims. Appellant was not with the surviving victim when the shots were fired. There is no reasonable hypothesis of innocence here. The trial court properly denied the motion.

POINT XI

THE APPELLANT WAS NOT ENTITLED TO A STATEMENT OF AGGRAVATING CIRCUMSTANCES FROM THE STATE PRIOR TO TRIAL.

Citing Barclay v. State, 362 So.2d 657 (Fla. 1979), appellant contends that he was entitled to a statement of the aggravating circumstances the state intended to prove. He further alleges that he was entitled to this prior to the guilt - innocence phase. In the instant case, the state informed appellant before the penalty phase of the aggravating circumstances they intended to prove.

Appellant is mistaken in his belief that a statement of aggravating circumstances is required from the state. As this Court stated in Hitchcock v. State, 413 So.2d 741 (Fla. 1982),

> § 921,141(5), Fla.Stats. (1975), sets out the aggravating factors to be considered in determining the propriety of the death sentence. The statutory language limits aggravating factors to those listed. (citations omitted) Thus there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove. At page 746.

See also Ruffin v. State, 397 So.2d 277 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1980).

POINT XII

THE TRIAL COURT WAS NOT IN ERROR IN FAILING TO DIRECT A VERDICT OF LIFE.

In appellant's Issue XI, he urges this Court to find that the trial court committed reversible error in failing to direct a verdict of life. Appellee will rely upon the evidence of guilt contained in its reply to appellant's claim of insufficient evidence (Point X), and also will rely on the evidence proving the aggravating circumstances demonstrated in appellee's sentencing issue (Point XVII).

POINT XIII

THE CASE OF ENMUND V. FLORIDA, 458 U.S. 782 (1982), DOES NOT SUBSTANTIALLY ALTER APPELLANT'S STATUS IN THE PROSECUTION FOR FIRST DEGREE MURDER.

Appellee consolidates appellant's Issues XXIV, XXV, and XXVIII, since they all deal with the theory of the defense that appellant was not the "triggerman" and is therefore entitled to some special treatment under Enmund v. Florida, 458 U.S. 782 (1982).

Initially appellant misinterprets Enmund, supra, to preclude the imposition of his death sentence and to require a radical change in Florida law on felony murder. Enmund does stand for the rule that if appellant did not kill, attempt to kill, intend to kill, or facilitate the killing, he is not appropriately sentenced to death. The evidence below clearly demonstrated premeditation. It further completely demonstrated that defendant was the triggerman (see the state's response to appellant's claim of insufficient evidence).

Appellant's claim that the trial court should have precluded death as a penalty based upon the theory that the state had failed to prove that appellant was the killer, is therefore meritless. Likewise, appellant's request for the trial court to modify his sentence, are based on the theory that the murder was committed by Waterfield, was properly denied.

Appellant further charges that he was prejudiced by the failure of the trial court to require the state to indicate whether it was proceding under felony murder, or premeditated murder. This clearly was not error.

> The state does not have to charge felony murder in the indictment but may prosecute the charge of first degree murder under a theory of felony murder when the indictment charges premeditated murder.

State v. Pinder, 375 So.2d 836, 839 (Fla. 1979); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). Enmund did not change this rule of law. In any event, as earlier related, Enmund does not apply to appellant.

POINT XIV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ITS INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE.

Again in laundry list fashion, appellant raises numerous claims concerning alleged impropriety in the sentencing instructions. Appellee will address each in turn.

(a) Appellant claims that the standard jury instruction given by the trial court concerning the jury's duty to determine whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances was error in that it shifted the burden of of proof to defendant contrary to Mullaney v. Wilbur, 421 U.S. 684 (1975). In this appellant is mistaken. This Court in Arrango v. State, 411 So.2d 172 (Fla. 1982), held that jury instructions must be examined as a whole.

> A careful reading of the transcript... reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. The standard jury instructions taken as a whole show that no reversible error was committed. At page 174.

See also Francios v. State, 423 So.2d 357 (Fla. 1982). As in Arrango, the burden never shifted to appellant herein. This request was properly denied.

(b) Appellant next claims that the trial court should have instructed the jury that defendant's character should be

considered in deciding whether the death penalty is appropriate. In denying appellant's request for a special jury instruction, the Court stated that he believed that the standard instructions already contained this instruction (R 3026). The instruction given by the trial court was:

> Now, you may consider, if established by the evidence, any aspect of the defendant's character or record in any other circumstances of the offense (R 3233)

Appellant's claim that error occurred because a further instruction was not given, is meritless.

(c) Appellant's request for a jury instruction that the process of recommending a sentence is not merely a tallying of aggravating and mitigating circumstances was made because he felt that the standard instruction was not clear on that point. The trial court disagreed, and gave the following standard instruction.

> Now, if one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. (R 3234).

Appellant cites Bodison v. State, 8 F.L.W. 505 (Fla. 1983), and White v. State, 403 So.2d 331 (Fla. 1981), to support his request for an instruction. Neither of these cases provide appellant any arguable issue. In Bodison, this Court held that the issue was unobjected to below and thus barred from appellate review. In White, this Court states:

> We do not believe, however, that this factor alone outweighs the enormity of the aggravating facts, especially in

> light of the defendant's full cooperation in the robberies and complete acquiescence in the cold blooded systematic murder or attempted murder of eight individuals. We hold, therefore, that the trial judge impose the death sentence consistently with Tedder. At page 340.

Thus, White was a jury override, and this Court had to apply the Tedder v. State, 322 So.2d 908 (Fla. 1975) standard. Appellant's claim on this ground is without merit.

(d) Appellant requested that the judge provide a special instruction that one factual circumstance cannot be used to support two aggravating factors (R 3015). The Court stated:

> THE COURT: The question is whether or not an additional instruction is relevant or merited (R 3017).

The court then invited appellant to give one instance in which the state's evidence could be doubled in that manner. Appellant was unable to cite a single fact which could be used to support two aggravating circumstances (R 3019). The Court properly declined to give an irrelevant instruction.

(e) As a special jury instruction, appellant requested that the trial court instruct that the death penalty is warranted only with the most serious of murders. The Florida statute provides the structure within which the advisory verdict to the jury and ultimate sentencing by the judge, precludes the death penalty except in the most serious of cases. The United States Supreme Court in Proffit v. Florida, 428 U.S. 242 (1976) so held. Appellant is asking this Court to instruct on an area that is already

covered by operation of the statute.

(f) Appellant cites Hill v. State, 422 So.2d 816 (Fla. 1982), for the theory that the trial court must instruct the jury that they cannot consider the murder cold, calculating and premeditated unless appellant possessed the intent to kill when he stopped to pick up the two victim hitchhikers (R 2990). Such an instruction would be error if it had been given here since it is clear that the appellant possessed the intent to kill his victim very early, but whether or not he possessed the intent when he picked them up is not clear. The surviving girl testified that appellant said he was going to slit her throat in any event (R 1801). This statement was made prior to appellant's shooting of Lynn Elliott. Whether defendant possessed the intent even earlier, is not relevant. The trial court did not err in refusing this instruction.

(g) Appellant's claim in (g) is substantially the same as the one made in (a) supra. Therefore the state relies on the response to (a) in answering the claim under this subsection.

(h) Under this subsection appellant charges that certain adjectives found in the standard jury instructions on mitigating circumstances require appellant to meet an enhanced burden of proof. This Court has previously found this claim meritless. In Johnson v. State, 438 So.2d 774 (Fla. 1983), stating:

> The list of mitigating circumstances set out in § 921.141(6), Fla.Stats. (1981), contains modifying terms such as 'extreme,' 'significant,' 'relative,' and 'substantial.' Johnson claims that these modifiers have the effect of improperly instructing the jury to disregard all mitigating evidence

> if the threshhold defined by the limiting words is not met. As this Court has previously commented, the statutory mitigating circumstances,
>
> > When coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.
>
> Peek v. State, 395 So.2d 492, 497 (Fla.) cert.denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). At page 779.

(i) Appellant next claims that it was error for the Court to fail to preclude the argument by the state that contemporaneous convictions qualify as aggravating circumstances. This issue is clearly non-meritorious since the state never argued that contemporaneous convictions would apply as an aggravating circumstance, and the Court never instructed the jury thereon.

(j) and (k) Appellant's last two subsections alleged insufficient evidence that support an aggravating circumstance, and thus allege error in giving the instruction thereon. The state will rely upon Point XVII of this brief to demonstrate fully that there was sufficient evidence both to prove the existence of the aggravating circumstances, and to warrant an instruction thereon.

POINT XV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON CONDUCT OF A JUROR.

During the trial, an epileptic juror had a slight attack. The record reflects the following outburst:

> JUROR NUMBER 11: Goddam him. Goddam him. (laughing)

The jury was immediately taken out of the courtroom and the effected juror was given medical attention. Appellant made a motion for mistrial stating that the juror's remarks reflected adversly upon his interest.

The motion for mistrial was addressed to the sound discretion of the trial court. Evers v. State, 280 So.2d 30 (Fla. 3rd DCA 1973). This Court has held that the device of mistrial is to be used only in cases of absolute necessity where further expense of time and effort would be futile. Ferguson v. State, supra. Clearly, no mistrial was mandated. The trial court gave the following curative instruction:

> THE COURT:...Ladies and gentlemen, any outbursts Mr. Brown may have made or may not have made - I did not hear - but I want to state to you, as I have stated to you from the very beginning, this case must be tried solely on the evidence and on the law and nothing else (R 2865).

This ruling and instruction clearly was not error.

> [a] trial court has a duty to insure that the defendant receives a fair and impartial trial and that jurors are tentative to the evidence presented. The conduct of jurors is a responsibility of the court and the court is allowed discretion in dealing with any problems that arise. Orosz v. State, 389 So.2d 1199, at 1200 (Fla. 1st DCA 1980).

Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984); Doyle v. State, ___ So.2d ___, (Fla. 1984) (9 F.L.W. 453).

POINT XVI

THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTION TO DEFENSE COUNSEL'S INCORRECT STATEMENT OF LAW DURING CLOSING ARGUMENT.

During his closing argument in the penalty phase, defense counsel stated that if the jury had returned its guilty verdict on a felony murder theory, some of the aggravating factors do not apply (R 3222). The state objected to this comment as being an incorrect statement of the law. The Court agreed. Appellant is free to comment on the law and evidence in closing argument, but he is not permitted to state the law incorrectly.

To allow a lawyer's misstatement of law will cause jury confusion or will tend to influence the jury to disregard the instruction on the law given by the trial court. In United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983), the Eleventh Circuit stated:

> In arguing the law to the jury, counsel was confined to principles that will later be incorporated and charged to the jury...appellant's jury nullification argument would have encouraged the jury to ignore the court's instruction and apply the law at their caprice. At page 106.

Appellant was arguing that certain aggravating circumstances could not apply to appellant. He could legitimately comment that there was no evidence to support the application of these circumstances,

but to make the pronouncement that some were inapplicable was a misstatement of the law. The Court did not err in sustaining the state's objection to this improper comment.

POINT XVII

THE SENTENCING OF DEATH IMPOSED UPON APPELLANT AT THE TRIAL BELOW IS APPROPRIATELY GIVEN.

Appellant argues in six separate issues that the death penalty was inappropriately given. These include Issues IX, XIIIV, XV, XVI, XVII, and XVIII. Appellee addresses all these issues separately but in a consolidated manner in one issue.

(A) Whether the trial court erred in finding that the capital felony was committed to avoid or prevent a lawful arrest?

Appellant contends that the trial court erred in finding this aggravating circumstance since the victim was not a police officer. Riley v. State, 366 So.2d 19 (Fla. 1979), cited by appellant, specifically found that this circumstance can apply to a non-police officer witness if there is clear proof that the murder was to avoid arrest.

The evidence is clearly strong enough to meet the Riley standard. The victim had been tightly bound to avoid the chance that she might escape and inform the police. When the victim got loose and ran out of the house, appellant ran after her, eventually catching her, and dragged her back to a spot near the house where he, execution style, shot her twice in the head. The victim had been sexually battered and it is clear that if she had lived,

appellant was subject to criminal prosecution on that ground.

Appellant exhibited the intent to kill the victims long before he actually shot Lynn Elliott (R 1801). Again we see the appellant acknowledging that the victims could press charges against him for the many sex crimes he committed. When the police surrounded the house, the appellant told the surviving victim to be quiet because she was going to die, if he did.

In Vaught v. State, 410 So.2d 147 (Fla. 1982), this Court upheld the factor of avoiding arrest when the evidence indicated the victim was murdered execution style. Further, in Elledge v. State, 408 So.2d 1021 (Fla. 1982), this Court upheld the circumstance upon evidence that appellant was afraid that the victim would provide testimony against him concerning the rape. In Welty v. State, 402 So.2d 1159 (Fla. 1981), the circumstance was found to apply when appellant had murdered the only witness to his burglary of a dwelling. See also Hitchcock v. State, 413 So.2d 741 (Fla. 1982) (where a victim of rape was eliminated).

Clearly, if appellant had let Lynn Elliott run free, she would have gone straight to law enforcement authorities to report the rape and also to help her friend who was still under appellant's control. Appellant could not let this happen, and the execution style murder points only to witness elimination.

(B) Whether the murder was committed in an especially henious, atrocious and cruel manner?

State v. Dixon, 283 So.2d 1, (Fla. 1973), provides the definition for a finding that the murder was committed in an

especially henious, atrocious or cruel manner.

> It is our interpretation that henious means extremely wicked or shockingly evil; that atrocious means outragiously wicked and vile; and, that cruel means designed to inflect a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes of the actual commission of a capital felony was accompanied by such additional acts as to set the crime apart from the normal capital felonies - the consciousless or pitiless crime which is unnecessarily torcherous to the victim. At page 9.

The facts herein clearly support the aggravating circumstances. The victim was kidnapped and thereafter tightly bound and gagged. See Knight v. State, 338 So.2d 201 (Fla. 1976), (the victim was kidnapped and held for ransom). After the victim arrived at appellant's home she was sexually assaulted. (See Alford v. State, supra, wherein sexual assault of the victim was evidenced of the suffering endured before death.)

A case very similar to the instant case is Lucas v. State, 376 So.2d 1149 (Fla. 1979). In Lucas, as in the case at bar, the victim and assailant struggled. The victim was dragged some distance and thereafter shot to death. The medical examiner testified that the victim had several injuries attributable to dragging and falling. Additionally, there was some standard evidence that the victim was told that she would be killed anyway which obviously caused mental anguish (R 1801).

(C) In Point XV of appellant's initial brief, appellant maintains that if any of the aggravating circumstances are found to be infirm, he is entitled to a new sentencing hearing. In this,

appellant is mistaken. The trial court found that no mitigating circumstances are present, thus if there are any aggravating circumstances the penalty may still be found to be valid. See Elledge v. State, 346 So.2d 998 (Fla. 1977); White v. State, 403 So.2d 331 (Fla. 1981).

(D) Whether the trial court erred in finding that the murder was committed in cold calculated and premeditated manner without any pretence of moral or legal justification?

This Court in Herring v. State, 446 So.2d 1049 (Fla. 1984), stated:

> We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness elimination murders. At page 1057.

This Court further explains that witness elimination is proof of a heightened premeditation which is a necessary finding for imposition of this aggravating circumstance. Thus, where an execution killing is shown, this circumstance is appropriate. See O'Callaghan v. State, supra.

The necessary heightened premeditation is present here. Defendant told the surviving victim:

> If I wasn't quiet, he'd slice my throat, and it didn't matter to him cause he'd do it anyway. (R 1801)

There was actually heightened premeditation in two forms. The first is the fact that the witness to the rape was eliminated execution style, and secondly, the fact that appellant told one

of the victims that he was going to kill her "anyway." The circumstance was properly found.

(E) Whether the trial court erred in failing to find the mitigating circumstance of no significant prior history of criminal activity.

> As to what is significant criminal activity, an average man can easily look at a defendant's record, lay traffic offenses on the one hand and armed robberies on the other, and determine which represents a significant prior criminal history. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance. State v. Dixon, supra, at page 9.

The state demonstrated that appellant had earlier been convicted of a serious felony while armed. The facts of that crime were summarized by the state attorney as follows:

> The defendant observed a very attractive female going to a doctor's clinic in Vero Beach; that the defendant went into her car, hid in the backseat; that he was armed with a .357 Magnum; that he had a police scanner with him and he also had a pair of handcuffs.
>
> That when the victim returned after going to the doctor, at the doctor's clinic, she approached her car, saw him crouched in the backseat, saw an officer close by, and went to the officer and advised him that someone was in the backseat of her car, whereupon the officer went to the car and told the defendant, Gore, to come out of the car and subsequently arrested him at that particular time.

The judgment and sentence for this crime can be found at pages 795 through 798 in the record on appeal. It was clearly not error for the trial court to conclude that this serious conviction negated

the mitigating circumstance of no significant prior history of criminal activity.

(F) Whether it was error for the trial court to find that the capacity of the defendant to appreciate the criminality of his acts, was not impaired.

Appellant here claims that he was precluded from presenting relevant evidence which would have demonstrated his lack of capacity to appreciate the criminality of his acts. Specifically, he alleges that the evidence concerning the existence of a bottle of liquor, and pain pills, in the master bedroom of Gore's home, should have been admitted. The Court stated:

> THE COURT: In the Court's opinion pills that were prescribed to the grandmother found in the bedroom of the house and the bottle of vodka that was found in the bedroom of the house, unless you can show that it is material and relevant to the case, in the Court's opinion it's just not admissible.
>
> MR. LONG: Well, as I have explained to the Court, it is evidence that David Gore was under the influence of drugs and alcohol on that date.
>
> THE COURT: Well, I think you're just going far beyond. If you're going to have some evidence that he actually took the pills and some evidence that he actually drank the vodka and some evidence that he was under the influence, than that's something else; but just to toss out something so that the jury can pick up pieces here and there, I think that's improper.

Appellant was free to place witnesses on the stand that could say that he had been drinking and acting strangly. The ruling was appropriate because there is nothing, including fingerprints, to link the alcohol or pills to the defendant.

In fact, to the contrary, there was evidence of appellant's ability to understand his surroundings and his rights when Miranda warnings were given and responses thereto were received. Clearly there was no error in the trial court's failure to find this mitigating circumstance.

SUMMARY

There was clearly sufficient evidence upon which the trial judge could make the findings concerning the aggravating circumstances found. Likewise, there was no substantial evidence to prove that the mitigating circumstances were demonstrated. The trial court did not err in imposing the death penalty upon appellant.

CONCLUSION

For the above and foregoing reasons, appellee, the State of Florida, respectfully requests that this Honorable Court affirm the judgment and sentence of death imposed upon appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 3rd day of January, 1985, to RICHARD SALIBA, ESQUIRE, Saliba & McDonough, P.A., 2121 14th Avenue, Box 1690, Vero Beach, Florida, 32961.

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