IN THE SUPREME COURT OF FLORIDA

ANTHONY BERTOLOTTI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,287

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ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee supplements Appellant's Statement of the Facts as follows:

The last time William Ward saw his wife, Carol, alive was at about 7:30 a.m. on September 27, 1983, when she waved good-bye to him as he set out for work (R 740). Mr. Ward testified that Tuesday was the day that his wife routinely shopped for groceries at the nearby Food World (R 742-3); he stated that she normally paid by check and that on that particular day she had about thirty dollars ($30.) in cash with her (R 742-3). The witness stated that his wife was in poor health at the time, weighing less than ninety pounds, and suffering from kidney problems and chronic migraine headaches (R 754). A checker at Food World testified to having seen the victim between 8:30 a.m. and 9:00 a.m. that morning (R 878).

When Ward returned home at about 5:00 p.m. that afternoon, he noticed a number of things which struck him as odd. First of all, he noticed that his wife's car, a bronze colored stationwagon, was gone and that the garage door was left open (R 741); upon pulling into the garage, he found that the connecting door to the house was unlocked (R 741-2). Stepping into the kitchen, he noticed some grocery bags sitting on the counter and other loose groceries scattered all over the floor (R 742). He found his wife's slacks, underwear and shoes lying in a corner on the kitchen floor (R 743). Ward then found his wife's body, naked from the waist down, with a knife protruding from it, in a small hallway between the step-in closet, containing a safe, and a bathroom (R 744). He immediately called the police (R 740).

Later, he returned to the kitchen and found that the costume jewelry which his wife normally wore was piled up by the sink (R 746). An

empty soda can was sitting on the calendar of her desk; he stated that this soda was "his" brand and that his wife never would have consumed it (R 746). He also found her purse, which he stated had been rifled, and noted that her car keys were missing (R 747). He stated that the sink in the nearby bathroom had blood stains upon it and that a blue towel, equally wet and stained, was lying across a chair in the den (R 748). Lastly, he testified that he had seen a broken beer stein lying on the floor by his wife's body (R 752).

The pathologist in this case was called to the scene and arrived at the Ward home at about 11:30 p.m. (R 786); he performed a later autopsy at the hospital (R 786). He stated that when he found Mrs. Ward, she was lying partly upon her left side and partly upon her stomach (R 795); one of the knives used in her murder had broken and the blade was lying upon her left thigh. Another knife was still sticking out of the body at the abdomen (R 795). He testified that a great deal of dried blood was underneath the body and scattered "all over up to a distance of about eight or ten feet." (R 796). Dr. Gore identified fourteen separate stab wounds, most in the chest and abdomen (R 797); he noted the presence of defensive wounds on the hands and arms and stated that they had been made while the victim had been attempting to defend herself (R 801). He further stated that the cause of death was extensive internal bleeding due to the stab wounds to the lungs and heart (R 803). He testified that the time of death was between 9:00 and 10:00 a.m. that morning and hypothesized that it would have taken Mrs. Ward "between five to eight or ten" minutes to die (R 809).

Dr. Gore also listed as a cause of death manual strangulation, although he described the internal bleeding as the primary cause (R 803) He detected the presence of petechiae or small hemorrhages of the eyes,

indicating a lack of oxygen and consistent with asphyxiation (R 798-9). He further noted the presence of marks on the throat consistent with manual strangulation (R 799). Dr. Gore further testified as to the bruises and contusions found upon the victim's neck, head and scalp (R 799-800); he identified the beer stein as an appropriately blunt instrument to have caused such injuries (R 800-1). He noted the presence of defensive wounds on the hands, which could have been made by application of blunt force (R 801). Dr. Gore also collected evidence relevant to whether or not any sexual activity had taken place. A later witness testified that intact spermatozoa, containing antigens which one with Appellant's blood type would possess, was found in Mrs. Ward's vagina (R 980,981); Mr. Ward had testified that, due to his wife's health, he had refrained from intercourse with her for the previous month (R 753).

The State called a number of witnesses who testified that Appellant had been dispatched to a temporary job two to three miles from the victim's house at approximately 7:30 or 7:45 that morning (R 826,1006). Appellant had walked off this job, without being paid, and had disappeared (R 820,833). A number of witnesses throughout the Rosemont area testified to having seen Appellant that morning, including one woman who had suddenly come upon him on her doorstep (R 850,826,871,874). Mary Finchum stated that she had found Appellant at about 8:30 a.m. standing on her front step, looking in the window (R 853.851). Appellant, carrying a newspaper, asked her directions and she provided them (R 853); later, on her way to work, she saw Appellant walking in the opposite direction (R 856).

Appellant had been living with Sharon Griest for ten months (R 928). At 10:45 a.m. that morning, she came upon Appellant sitting outside their home (R 908). Appellant stated that he had some money, having borrowed

some and received payment for his job that morning (R 905-6). She testified that Appellant began to change over the following week, becoming withdrawn (R 906). When Griest found out that Appellant had not in fact been paid for his work that morning, she began to fear his involvement in the instant offense (R 908-911). She noted that he showed particular interest in the news reports relating to the finding of the victim's car; such vehicle had been found located several blocks from both their prior and present residences (R 908,1006). Griest accordingly called Crime Watch to determine that time of the murder (R 911), eventually meeting with one of the officers there. Later, Appellant had called her to a motel room and, in an emotional confrontation, admitted to having killed Mrs. Ward (R 915). He stated that he had been trying to get some money and that he had come upon the victim as she was unloading groceries from her car. He had asked her for directions and then followed her into her home when she went to get some paper to draw a diagram for him (R 916-17). Once there, he had demanded money and she had screamed; when he grabbed for her purse, she grabbed a knife and, when he took it away from her, he killed her (R 917). Appellant also told Griest the location of her bloodstained blue jeans which he had been wearing (R 916). The two had then driven to a pay phone where Appellant called his mother (R 918). The next morning Griest called Investigator Scoggins and after doing so, sought to persuade Appellant to turn himself in; apparently after he had seen the officers pick her up, he left on his own (R 927).

At the police station, Sharon Griest signed a written consent form, authorizing the police to search her home (R 952-3). Accordingly, on October 5, 1983 the police recovered the bloodstained jeans and similarly stained teeshirt (R 954); Griest had already turned over to the police a pair of shoes belonging to Appellant (R 919). A laboratory analyst and

forensic serologist from the Sanford Crime Lab tested the physical exhibits; he found human blood on all three and noted that on the shirt and pants this blood was inconsistent with Appellant's blood type and consistent with that of the victim (R 986,987,989,993).

Appellant was arrested on October 5, 1983 and gave a confession, which was tape-recorded and introduced into evidence (R 1014, State's Exhibit #42). In such statement, he acknowledged that he had killed Mrs. Ward. He stated that he had been upset because he was, apparently, taken to the wrong job site, in that he had been hired for a permanent job the day before at another location. He had, thus, walked away from the job site and begun looking for a bus stop. He claimed that he had met a former neighbor of his and purchased a quaalude. He had kept going and had approached one mobile home to ask directions. After walking around Rosemont further, he had then come upon the victim, who was then standing in her driveway.

Appellant claimed that Mrs. Ward had wished him a good morning and had asked him whether he needed a drink of water. Appellant had in turn asked her if she could make a phone call for him, calling Sharon Griest at work. When Mrs. Ward reported that she did not know which Steak-n-Egg to call, she then, according to Appellant, invited him inside to make the call himself. Once there, he picked up a knife and demanded her money. He stated that Mrs. Ward had then taken off her clothing voluntarily; he also stated that she had offered him her costume jewelry. In any event, Mrs. Ward then opened her wallet and gave Appellant the thirty-one dollars ($31.) inside.

According to Appellant, Mrs. Ward then went to the back of the house and opened the safe, but did not find any money inside. Then, while Appellant still held the knife on her, Mrs. Ward began to pray for him, stating that she would like to help him and his girlfriend. The victim then

stated that she would drive Appellant home and started to get up and walk back to the kitchen; at this point, Appellant grabbed her arm. At first, apparently, Mrs. Ward had sought to talk Appellant into giving her the knife; according to him, she then grabbed for it and screamed. Appellant stated that he had then begun to stab her. The victim fell and, subsequently, the knife broke. Appellant then went back to the kitchen and got another. Appellant stated that at this time the victim was still alive, making noise and getting up off of the floor.

Once rearmed, Appellant recommenced stabbing Mrs. Ward, eventually leaving the second knife sticking out of her body. He also stated that he had then begun hitting her with the beer stein and probably had strangled her. When Mrs. Ward finally stopped moving, Appellant stated that he had looked down at her and cried. He then washed his hands and drank a can of soda before leaving in the victim's car. Appellant stated that he had not raped Mrs. Ward.

Appellant then discussed hiding the bloodstained clothes and telling Sharon Griest that he had borrowed or earned the money. He stated that he had used the money to make a TV rental payment and to purchase food and marijuana. He eventually told Sharon Griest of the crime and was apparently aware that the police were looking for him. The two had discussed leaving town. He claimed that he wanted to die for his crime (State's Exhibit #42).

Fifteen days later, Appellant gave another tape-recorded confession, after asking to speak with the investigating officers (R 1025); this tape was also introduced into evidence (State's Exhibit #44). Appellant stated at this juncture that he had been previously covering up for Sharon Griest in his first statement. He now claimed that after walking off his

temporary job, he had caught a bus directly home; accordingly, when he met up with Sharon Griest at about 9:30 or 10:00 a.m., Mrs. Ward was still alive.

The two had then discussed their precarious finances and Griest had stated how much she would have liked to have been able to steal their neighbor's video recorder. Griest then showed great interest in Appellant's description of the area which he had been in that morning and proceeded to drive the two of them there in her car. Griest proposed breaking into homes where the occupants were absent; prior to this, they had stopped and bought a newspaper which Griest insisted that Appellant carry under his arm.

Accordingly, at about 11:00 a.m., Appellant had met up with Mary Finchum as he "cased" her house. Thwarted by her presence, the two had then gone on into the development and had come upon the victim as she carried her groceries into her house. Griest told Appellant to hide in the car as she walked up to Mrs.Ward, claiming that her car had broken down and asking to use the telephone. When he saw that Griest had accomplished her mission, i.e. gotten into the house on this pretext, Appellant came up to the door. Seeing that the victim had her back turned, Appellant entered; when Mrs. Ward saw him, she screamed.

At this point, Sharon Griest grabbed Mrs. Ward around the throat and Appellant grabbed a knife from the dish rack. Mrs. Ward continued to scream and Griest demanded all her money. The victim revealed the location of her purse and Griest took the money out. Mrs. Ward then, apparently, claimed that there was additional money in the safe and she led the two back to the hallway; after she had opened the safe and gone through it, however, no additional cash was discovered. Griest went to other parts of the house and, at this juncture, Mrs. Ward asked Appellant if she could take some of the medication which was in the kitchen. The two of them accordingly pro-

ceeded back to the kitchen.

Once there, Mrs. Ward offered Appellant her costume jewelry, which he declined, and despite his knife, grabbed him. At this point, Mrs. Ward spontaneously began pulling her pants off, offering to have sex with Appellant. Sharon Griest entered the kitchen at this point and became angry. Griest directed the victim to return to the safe. All three of them walked to the back hallway and, after a futile search for money, Mrs. Ward grabbed Sharon Griest around the legs and asked not to be hurt. Griest then turned to Appellant and stated that they could not "leave her like that." She then told Appellant to stab the victim.

Appellant did so and, when his knife broke, Griest supplied another. He then struck Mrs. Ward with what he called a "vase" because she kept trying to get up; he denied choking or strangling her or having sex with her. Appellant then washed up and Griest told him to take the victim's car, because she did not wish him to get blood on the seat of her own. Accordingly, he followed Griest in Mrs. Ward's car; Appellant stated that Griest took a watch and a set of cufflinks from the house. He estimated that it was then around noon.

After unsuccessfully trying to dispose of the car, Appellant drove it to a bad neighborhood where he hoped that it would be stolen. He claimed that Griest had later decided to call Crime Watch so that they could bilk the agency out of the one thousand dollar ($1,000.) reward. The plan was for Appellant to be arrested, but later released for lack of evidence, after the thousand dollar payment had been made; the two would then split the money. Appellant was not sanguine of this plan's success, but after his arrest, he continued to protect Griest. Two weeks later, however, he had apparently decided to "come clean". (State's Exhibit #44).

At the penalty phase, the State called six witnesses. Apparently in rebuttal of the confessions, the victim's husband testified that his wife was upset by strangers, particularly young males, and habitually would not open the door to strangers (R 1355-7). Also, apparently in rebuttal of the confessions, Claudio Garalde, Appellant's Hawaiian former neighbor, testified that he had not seen Appellant on September 27, 1983 and had not sold him a quaalude on such date (R 1359-1363). Additionally, two officers from the Metro Dade Police Department testified concerning Appellant's prior felony convictions. Sergeant Delancy testified that Appellant's aggravated battery conviction stemmed from an attack upon Deborah Burns, his then-girlfriend. After the two had had an argument, Appellant stabbed her in the arm, shoulder and head with a butcher knife (R 1310). Delancy's testimony was based upon police reports and statements from Miss Burns, as well as from admissions made by Appellant (R 1313-1314).

Detective Lengel supplied the background for Appellant's prior convictions of burglary with an assault and attempted sexual battery. Lengel stated that Appellant had gone to the residence of Puralee Hunter, a twenty-one year old female who was a deaf mute (R 1327). Appellant knocked on the door and moved around in such a way that Miss Hunter became aware of him (R 1328). Once she had answered the door, Miss Hunter provided Appellant with a sheet of paper and pencil; he wrote thereupon, "Can I check your meter box?" (R 1329). Miss Hunter then admitted Appellant to her apartment and showed him the fuse box; after he had looked it over, he grabbed her by the arms and forced her into the living room (R 1330). Appellant then began choking her and tearing her clothing, eventually stopping, standing up and pointing to his genital area and pounding his fists (R 1330-1). Miss Hunter, however, resisted and succeeded in escaping (R 1331). Detective Lengal based

his testimony upon information from police reports, information from the victim and admissions by Appellant (R 1340). Appellant had entered pleas of guilty to all of these offenses, as well as that involving Deborah Burns (R 1342, State's Exhibit #1,2,3,Sentencing).

POINT I

DENIAL OF APPELLANT'S MOTION TO STRIKE DEATH AS A POSSIBLE PENALTY WAS NOT ERROR

Prior to trial, Appellant moved to strike death as a possible penalty on the grounds that the indictment did not place him on notice of the potential aggravating factor (R 2125-6); the trial court, citing to such decisions as Ruffin v. State, 397 So.2d 277 (Fla. 1981) and Tafero v. State, 403 So.2d 355 (Fla. 1981), denied the motion (R 1178). Appellant asserts this ruling as error on appeal and cites for analogy to a district court decision involving aggravated battery. Appellee does not find this a convincing parallel.

This Court has repeatedly rejected the argument which Appellant is now making. See Menendez v. State, 368 So.2d 1278 (Fla. 1979); Clark v. State, 379 So.2d 97 (Fla. 1979); Mines v. State, 390 So.2d 332 (Fla. 1980); Ruffin, supra; Sireci v. State, 399 So.2d 964 (Fla. 1981); Tafero, supra; Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Preston v. State, 444 So.2d 939 (Fla. 1984). Further, Appellant's usage of the language from Vaught v. State, 410 So.2d 147 (Fla. 1982), does not prove his case. As this Court recently observed in Preston, supra, the death penalty statute itself places a defendant charged with a capital felony on notice that the provisions of § 921.141(5) will be applied. This point is without merit.

POINT II

DENIAL OF APPELLANT'S MOTION FOR CHANGE OF VENUE WAS NOT ERROR

Appellant filed a pre-trial motion for change of venue, contending that he could not receive a fair trial in Orange County, due to the extensive publicity concerning the incident, his arrest and the statement which he had given; Appellant appended three affidavits and copies of newspaper articles to his motion (R 2222-2230). The motion was called up for a hearing on March 19, 1984; Judge Stroker ruled that Appellant had not made a sufficient showing of prejudice and denied the motion with leave for Appellant to refile, if desired (R 1155). In the same hearing, the judge granted Appellant's motion for individualized voir dire of the venire and for sequestration of the jury during voir dire (R 1171,2246).

On March 26, 1984 Appellant renewed his motion for change of venue, drawing the court's attention to additional news reports of the incident which had been broadcast on various television stations (R 1195). Appellant called as witnesses personnel from the various news stations and Judge Stroker viewed video tapes of the broadcasts themselves, which apparently aired on September 28, 1983, October 5, 6, 1983, as well as on March 16, 19, 1984 (R 1197,1202,1207,1266). The judge again denied Appellant's motion as premature (R 1267-1268).

Later that day, jury selection began and continued over the next two days (R 1-695). By Appellee's count, fifty prospective jurors were voir dired before a jury of twelve and two alternates was chosen. Of that fifty, by Appellee's count, only thirteen were excused for cause; of this group, only prospective jurors Diller, Shimkonis, Dewitt, McKelvy, Spychalski and Johnson were excused due to a preconceived notion of Appellant's guilt (R 85,87,190,429-30,432,456,458,461,497). In response to

questions from Judge Stroker and the respective attorneys, the rest of the venire stated that they could determine Appellant's guilt or innocence on the basis of the evidence presented only, and not due to any preconception (R 27-8,36,48,73,90,97,114,124-5,137,181,196,206,215,229,241,252,274-5,285, 300,314,325,335,345,360,375,388,396,483,500,512,524,540,551,565,580,596, 611-12,624). Many jurors acknowledged that they either had no knowledge of the incident or knowledge only that the crime itself had occurred; it must be noted that six months had elapsed between the time of the murder and the trial (R 27,72,92,116,128,137,197,205,215,244,251,274,284,299,313,324, 334,374,386,395,510,527,540,550,564,612,623). By Appellant's own count, only seven of the fifty jurors even knew of the existence of the confession. Of the panel chosen, three had absolutely no prior knowledge of the incident, nine had only a little and two knew of the existence of the confession (R 27,72,116,137,244,299,324,395,313,51,359,176,334,510).

Appellant has failed to demonstrate that he was denied a fair trial or that a change of venue was required. This issue has arisen often in capital cases. See Dobbert v. State, 328 So.2d 433 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Hoy v. State, 353 So.2d 826 (Fla. 1977); Jackson v. State, 359 So.2d 1190 (Fla. 1978); Thomas v. State, 374 So.2d 508 (Fla. 1979); Manning v. State, 378 So.2d 274 (Fla. 1979); Straight v. State, 397 So.2d 903 (Fla. 1981); Oats v. State, 446 So.2d 90 (Fla. 1984); Copeland v. State, __So.2d__, Case No. 57,788 (Fla. September 13, 1984)[9 FLW 388]; Davis v. State, ___So.2d__, Case No. 63,374 (Fla. October 4, 1984)[9 FLW 430]. Only in Manning was the conviction on appeal reversed due to the trial court's denial of the motion for change of venue. This case has no similarity with Manning, in that, despite whatever role the Orlando Sentinel plays in Orange

County, the community at issue was not rural or remote, such that any publicity would have the likelihood of inflaming the entire pool of perspective jurors.

In resolving claims of this nature, this Court has often cited to the United States Supreme Court decision of Murphy v. Florida, 421 U.S. 794 (1975), which stated that qualified jurors need not be totally ignorant of the facts and issues involved, as long as they can lay aside any prior opinions and render a verdict based upon the evidence presented at trial. See also Irvin v. Dowd, 366 U.S. 717 (1961); Dobbert v. Florida, 432 U.S. 282,304 (1977), which held extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair. Additionally, in McCaskill, this Court adopted the test previously set out in Kelley v. State, 212 So.2d 27,28 (Fla. 2d DCA 1968), to the effect that,

> [K]nowledge of the incident because of its notoriety is not in and of itself grounds for change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by the knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom (citations omitted).

Appellant has failed to demonstrate, under prior caselaw, that he merited a change of venue, in that he failed to establish or make a sufficient showing of community prejudice; the jurors chosen, as well as a majority of the rest of the venire, all indicated that they would make their verdict choice solely on the basis of the evidence presented at trial. It must be noted that in Copeland v. State, supra, every member of the panel had prior knowledge of the crime, which was not the case sub judice. Denial of the instant

motion was not error. Thomas, supra; Davis, supra.

Appellant, however, contends that under Oliver v. State, 250 So.2d 888 (Fla. 1971), the trial court was mandated to grant his motion for change of venue, in that the media had reported the fact, and summaries of, his statements; it should be noted that the newspaper never used the term "confession". Oliver, however, has twice been revisited by this Court. Compare Hoy, supra; Straight, supra. Whereas in Oliver this Court stated that, as a general rule, when a "confession" is featured in news media coverage of a prosecution, a change of venue should be granted when requested, this Court did not reverse the conviction in Hoy and Straight, wherein exactly such eventuality had occurred. Thus, in Hoy, this Court noted that at most a summary of the defendant's confession had been reported and that none of the jurors had seen the articles in question, which were printed in a newspaper outside of the community in which the crime took place. Similarly, in Straight, this Court noted that the result in Oliver was explainable, in part, by the fact that the crime had taken place in a relatively small community; in Straight, as in the case sub judice, the crime occurred in a metropolitan and populous area. The gist of Straight and Hoy, as well as of such decisions as Copeland, is that no "general rule" exists as to motions for change of venue and that each case must be decided upon its own facts. Here, Appellant never demonstrated that a general atmosphere of hostility pervaded the county to such an extent that movement of the trial was warranted.

The jury "numbers" speak for themselves. Only fifty persons were called in order to empanel fourteen, and of this number, only six were excused for cause traceable in part to pre-trial publicity. All those chosen, and the vast majority of those examined, indicated that they could make their verdict choice based solely upon the evidence presented in court; most jurors simply

had knowledge that the instant incident had occurred. Further, the venire was not chosen from a small, insular rural community; this Court may take judicial notice of the population of Orange County, being by any description a metropolitan area. Any per se rule mandating a change of venue whenever a "confession" is disseminated through the media would prejudice both the State and defense and, in all likelihood, empty courtrooms in all urban areas of the State. This Court has consistently refused to apply such rule blindly and Appellant has failed to demonstrate that he merits relief on this score. Denial of the instant motion for change of venue was proper, and this Court should affirm Appellant's conviction.

POINT III

DENIAL OF APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION WAS NOT ERROR

On March 15, 1984 Appellant filed a motion to suppress directed toward both of the statements or confessions which he had made. As to the statement of October 5, 1983, Appellant contended that such statement had been obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), in that it had been given in a coercive atmosphere and in that Appellant had, at the time, been too distraught to have knowingly waived his rights (R 2220-2221). The motion was called up for a hearing on March 26, 1984, at which one witness, Detective Scoggins, testified (R 1229-1248).

Scoggins testified that he had interviewed Appellant shortly after the latter's arrest on October 5, 1983 (R 1230). Prior to any statement being given, the detective advised Appellant of his Miranda warnings, (R 1231-2). The witness stated that Appellant had answered, "no", to the question regarding his desire for an attorney; Appellant again said,"no", when asked if he had been threatened, coerced or promised anything in return for his statement (R 1231-2). When asked if he understood his rights and wished to talk, Appellant answered both questions in the affirmative (R 1232). A signed Miranda rights card was introduced into evidence (R 1232). Scoggins testified that at no time during the lengthy confession did Appellant request an attorney or refuse to speak further (R 1233). The detective described Appellant as "very voluntary" as far as his willingness to talk (R 1234). During cross-examination, Scoggins stated that Appellant had cried and sobbed at various times during the statement, but that at no time had he seemed to "be losing control of what he was doing". (R 1238).

Appellant did not testify at this hearing. At the close of the

testimony, Appellant's attorney contended that the totality of the circumstances indicated that Appellant had been too emotionally upset to intelligently waive his rights (R 1249). After argument by the State, Judge Stroker announced that he saw no evidence of coercion or duress and stated that the sobbing was the only evidence of emotional upset (R 1250). He then stated that he found the statement to have been voluntarily made and admissible (R 1251).

On appeal, Appellant contends that Judge Stroker erroneously placed the burden of proof upon him and that the confession should have been suppressed, pursuant to this Court's decision of DeConingh v. State, 433 So.2d 501 (Fla. 1983); in such case, this Court found that the defendant, hospitalized, drugged and hysterical, did not knowingly waive her Miranda rights, such that her later statements were voluntary. DeConingh, however, has important procedural elements which Appellant has ignored.

In Deconingh the trial court suppressed the statements. The State then appealed to the district court, which reversed. When this Court in turn reversed the district court, it held that the ruling of the trial court should have been affirmed and noted that such rulings come to any reviewing court with the presumption of correctness. See Stone v. State, 378 So.2d 765 (Fla. 1979). This Court observed that the district court had substituted its judgment for that of the finder of fact below impermissibly.

In the case sub judice, Judge Stroker found the statements voluntary. Such ruling comes to this Court with the presumption of correctness, see Jones v. State, 440 So.2d 570 (Fla. 1983), and was made, properly, after consideration of the totality of the circumstances. See Palmes v. State, 397 So.2d 648 (Fla. 1981). In this case, whereas the State had the burden of establishing voluntariness by a preponderance of the evidence, Appellant,

as the movant to suppress, had some burden to establish coercion or lack of voluntariness to support his motion. The only evidence which Judge Stroker heard was the testimony of Detective Scoggins, who stated that Appellant had seemed to always know what he was doing and to have understood his rights. While it is beyond dispute that Appellant did sob and cry out at various intervals during the statement, as this Court recognized in Thomas v. State, __So.2d__, Case No. 61,170 (Fla. September 13, 1984)[9 FLW 392], delusion or confusion which originates from a suspect's own apprehension, mental state or lack of factual knowledge, does not mandate suppression of any statement. In Thomas, this Court cited to State v. Caballero, 396 So.2d 1210 (Fla. 3d DCA 1981) and Ebert v. State, 140 So.2d 63 (Fla. 2d DCA 1962), as support for such proposition; in the latter case, the defendant was described as crying and disturbed because of his predicament at the time that he admitted guilt. Compare also Hawkins v. Wainwright, 399 So.2d 449 (Fla. 4th DCA 1981), wherein the trial court's ruling as to the voluntariness of a confession was approved, where the defendant had broken down and cried at intervals throughout the tape-recorded confession. Based on the above, Judge Stroker's ruling was correct.

Additionally, as this Court also recognized in DeConingh, a defendant's lack of mental capacity at the time of confessing usually relates only to the statement's credibility, as opposed to admission. Thus, while this Court has reversed on occasion when it has been determined that the defendant was too intoxicated to understandingly waive his rights, see Reddish v. State, 167 So.2d 858 (Fla. 1964), such result, especially in capital cases, seems to be the exception, rather than the norm. This Court has repeatedly denied post-trial assaults on a trial court's determination of voluntariness of a confession. Compare Burch v. State, 343 So.2d 831

(Fla. 1977), defendant told of non-existent polygraph results; Ross v. State, 386 So.2d 1191 (Fla. 1980), defendant claimed youth and mental weakness prevented voluntary waiver; Antone v. State, 382 So.2d 1205 (Fla. 1980), defendant suffered heart attack and admitted to hospital prior to statement; Atkins v. State, 452 So.2d 529 (Fla. 1984), defendant claimed intoxication precluded knowing waiver. The above precedents are more applicable to the case sub judice than DeConingh.

In conclusion, no reason exists to disturb the ruling of the court below. Appellant's statement was shown to have been voluntarily made. In contrast to the case relied upon by Appellant, no witnesses testified to Appellant's disoriented and confused condition; Scoggins stated that, even when he broke down, Appellant did not seem to lose control of what he was doing (R 1238). It is hard to credit Appellant's contention that he "blurted out" his admissions; he gave a very detailed statement which consumes 48 minutes of tape. Appellant has failed to demonstrate reversible error as to this point and his conviction should be affirmed.

POINT IV

DENIAL OF APPELLANT'S MOTION TO SUPPRESS EVIDENCE WAS NOT ERROR

On March 15, 1984 Appellant filed a motion to suppress the items of clothing taken from his apartment on October 5, 1983 (R 2187-8); Appellant claimed the clothing had been seized without a warrant and that no exigent circumstances or personal consent existed (R 2187-8). The motion was called up for hearing on March 26, 1984, at which two witnesses, Charles Smith and Sharon Griest, testified (R 1210-1220). Sharon Griest testified that she and Appellant shared a one bedroom apartment at 725 1/2 Putnam Avenue (R 1217); both of them had signed the lease agreement and both of their names were upon it (R 1219-1220). Mrs. Griest stated that she and Appellant had joint control of the apartment and that both of them paid the rent (R 1218).

Mrs. Griest stated that, prior to October 5, 1983, she had advised the police of the location of certain articles of clothing in the apartment (R 1217); Lieutenant Smith testified that the witness had informed him that a pair of pants would be behind a heater on the screened porch and that a teeshirt would be in a clothes hamper in the bedroom shared by Appellant and Mrs. Griest (R 1215,1219). Mrs. Griest went to the police station on October 5, 1983 and executed a signed consent form authorizing the police to search the apartment (R 1217-18); this form was introduced into evidence at the hearing (R 1218,1214). Smith testified that he found the articles of clothing at the respective locations indicated on such date (R 1215-16). He stated that he did not know in what capacity Mrs. Griest might have been "working for" the police (R 1213).

Appellant did not testify at the hearing. At the conclusion

of the testimony, his attorney argued that the officers should have gotten a warrant because Mrs. Griest was "to an extent" assisting on the investigation as "somewhat of a police agent." (R 1221). The State argued that Mrs. Griest had consented to the search and that she possessed joint control over the premises (R 1222). Judge Stroker ruled that the items had been removed from common areas in the apartment and that Mrs. Griest had standing to authorize the search. He denied the motion to suppress (R 1223). At trial, Appellant renewed his objection to the admission into evidence of the pants and teeshirt, but he did not add any additional grounds or refer the judge to any evidence elicited subsequent to the suppression hearing (R 962).

On appeal, Appellant challenges the denial of his motion. It is important to note what he does not raise. Appellant does not contend that Mrs. Griest lacked authority to consent to a search of the apartment or that the areas searched were within his personal control; similarly, he does not argue that her consent was involuntary or motivated by feelings of antipathy toward him. Compare State v. Blakely, 230 So.2d 698 (Fla. 2d DCA 1970); Lawton v. State, 320 So.2d 463 (Fla. 2d DCA 1975); Silva v. State, 344 So.2d 559 (Fla. 1977). Considering Mrs. Griest's testimony in this case, such challenges would have been unavailing; she had authority to consent to the search and it did not invade any private "domain" of Appellant. Compare Dees v. State, 291 So.2d 195 (Fla. 1974); Ferguson v. State, 417 So.2d 631 (Fla. 1982); Preston v. State, 444 So.2d 939 (Fla. 1984). The instant ruling, coming to this Court with the presumption of correctness, should be approved. Compare Shapiro v. State, 390 So.2d 344 (Fla. 1980); Johnson v. State, 438 So.2d 774 (Fla. 1983).

Appellant does argue, however, that, the items of clothing

should have been suppressed because, at the time of her consent, Mrs. Griest was acting as an agent of the State; for support, Appellant cites to United State v. Henry, 447 U.S. 264 (1980) and State v. Glosson, 441 So.2d 1178 (Fla. 1st DCA 1983). These cases do not support Appellant's argument and neither does the record on appeal. This point is without merit.

At the suppression hearing, Mrs. Griest testified that she had "talked to" the police on two occasions prior to the search (R 1220); she also stated that she had advised them in advance of the location of the various items of clothing (R 1217). Lieutenant Smith testified that Mrs. Griest had come to the police station "many times" prior to the time that she executed the consent to search for them (R 1213). He also stated that he had never spoken to her on any of these occasions and had no idea "what capacity she might have been working for or with" the police (R 1213). This is the sum total of the evidence presented at the suppression hearing; there is nothing else. In his brief, however, Appellant cites to various portions of Mrs. Griest's trial testimony, as well as to her deposition which was never admitted into evidence (Brief of Appellant at 15, 16, 17). In Appellee's respectful opinion, this is completely improper. These "facts" were not before Judge Stroker when he was called upon to rule on the motion to suppress. Although Appellant did summarily "renew" his motion at the time the evidence was to be admitted, he never drew the judge's attention to any "new"evidence elicited at trial. Appellee suggests that Appellant is impermissibly modifying the factual basis for his motion on appeal and that this Court should, accordingly, disregard this argument. Cf. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Additionally, Appellant's premise is not well-taken. Mrs. Griest bears no similarity to the police informant in Henry who "deliber-

ately elicited" statements from the defendant, in violation of latter's Sixth Amendment to counsel; here, Mrs. Griest consented to the search of her own apartment. Further, the situation sub judice has nothing in common with that before the court in State v. Glosson; in that case, the First District observed that the circumstances of the case before it seemed to resemble an instance in which the State was manufacturing crime, as opposed to seeking evidence of it. If Mrs. Griest's position does have any parallel, it would seem to be with the wife of the defendant in Coolidge v. New Hampshire, 403 U.S. 443 (1971).

In Coolidge, the defendant's wife turned over to the police, consensually, certain items of her husband's clothing, as well as some firearms; the police did not have a search warrant or the consent of her husband. Coolidge claimed that his wife had been acting as an agent or instrument of the State and that, accordingly, she could not have waived his right to protest an unreasonable search. The United States Supreme Court found that no search or seizure, unreasonable or otherwise, had taken place; the court noted that Mrs. Coolidge had been motivated by a desire to clear her husband of suspicion. Appellant sub judice never asked Mrs. Griest why she had turned over the clothing, in effect, to the police. Instead, he seeks now to portray her as some sort of money-grubbing harpy by selective use of her trial testimony, in which she acknowledged receiving $1,000, left untouched, from Crime Watch, after Appellant's arrest (R 938-9). This post-trial character assasination is unwarranted; it should be noted that Mrs. Griest testified on Appellant's behalf at the penalty phase (R 1379-1383). Appellant totally failed to demonstrate that Mrs. Griest was an agent of the State or that she acted from any impure motives at the time she consented to the search of her own apartment. Denial of Appellant's motion to suppress was proper and his conviction should be affirmed.

POINT V

DENIAL OF APPELLANT'S MOTION FOR MISTRIAL WAS NOT ERROR

During her direct examination, Sharon Griest was asked what Appellant's response was to her request that he turn himself in; she answered as follows:

> I just about had him talked into going with me, and he asked me if he could have one more day of freedom because he knew he was going to go to prison again, and I said -- (R 924-5).

Appellant's counsel immediately moved for a mistrial, arguing that the jury was now aware that Appellant "had previously been in prison possibly prior to this criminal episode" and that a mistrial was called for whenever mention of a prior felony occurred (R 925). The State responded that the answer had been an inadvertent response, despite prior cautioning; the prosecutor, while contending that the evidence was not inadmissible, also stated that he would not oppose the giving of a cautionary instruction (R 925-6). Appellant's counsel, however, argued against the giving of any such instruction, and Judge Stroker denied the motion for mistrial and acceded to the defense wishes that no instruction be given (R 926).

Appellant contends that this ruling constitutes reversible error, in that evidence of the commission of an independent and collateral crime was placed before the jury, to Appellant's prejudice, by the testimony of Mrs. Griest. In support of this contention, Appellant relies upon two district court decisions, Jones v. State, 194 So.2d 24 (Fla. 3d DCA 1967) and Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). In Jones, the district court, citing to a number of out of state decisions, reversed the conviction at issue because the prosecutor had mentioned in opening statement the defendant's mug shot; in Rodriguez, the court reversed when a state

witness testified that Appellant had been involved in another murder. Obviously, the inadvertent statement sub judice is not on a par with that in Rodriguez. Additionally, if Jones is read to stand for the proposition that any mention of a defendant's mug shot is per se reversible error, it must be noted that such case has very, very limited applicability. The Third District itself has expressed discomfiture with the Jones holding, see Williams v. State, 233 So.2d 428 (Fla. 3d DCA 1970), and other district courts have followed suit and refused to apply it. See Anderson v. State, 230 So.2d 704 (Fla. 2d DCA 1970); Hampton v. State, 426 So.2d 1296 (Fla. 4th DCA 1983). In Loftin v. State, 273 So.2d 70 (Fla. 1973), this Court discussed Jones with a notable lack of warmth.

Appellee prefers to rely upon decisions of this Court in resolving this point. Thus, it is worth noting that in Ferguson v. State, 417 So.2d 639 (Fla. 1982), this Court approved the denial of a motion for mistrial when one of Appellant's co-defendants, referring to himself, another co-defendant and Appellant said, "...my first time in prison, all three of us was together." This Court found that no mistrial was required and observed that the defense had not sought a curative instruction, a relevant observation to the case sub judice. Further, to the extent that Jones has applicability, it is worth noting that in Sims v. State, 444 So.2d 922 (Fla. 1983), this Court found a vague reference to the defendant's mug shot insufficient grounds for mistrial. Ferguson and Sims dictate that denial of the instant motion for mistrial was correct. Compare also Warren v. State, 443 So.2d 381 (Fla. 1st DCA 1983), witness's inadvertent statement that he had seen defendant when the latter was "down in prison" insufficient grounds for mistrial, where no curative instruction requested; Williams v. State, 354 So.2d 112 (Fla. 3d DCA 1978).

This Court has frequently held that motions for declaration of a mistrial are addressed to the sound discretion of the trial court and that such motions should be granted only in cases of absolute necessity. See Salvatore v. State, 366 So.2d 745 (Fla. 1978); Wilson v. State, 436 So. 2d 908 (Fla. 1983). There is absolutely no indication that Appellant's trial was irretrievably tainted by Mrs. Griest's slip of the tongue and there was absolutely no basis to discharge the jury. Given the strength of evidence against Appellant, it is inconceivable that the statement at issue could have played any part in the choice of a verdict. When the jury came to deliberate, they had already heard two confessions by Appellant, as well as his admissions to Mrs. Griest. They had viewed his blood-stained clothing, which had been recovered from his apartment, and had heard the testimony of witnesses who placed Appellant in the vicinity of the crime prior to its occurrence. Additionally, they had heard the closing argument of Appellant's attorney, in which such attorney represented to them not that his client was totally innocent, but that he was guilty of second degree murder at most (R 1086,1106); it should be noted that this was not a change of strategy, in that in his opening statement, defense counsel had intimated that the State would prove a lesser degree of homicide (R 736-7). The jury in this case made their decision on the basis of the evidence, and denial of Appellant's mistrial motion was not error.

Additionally, it should be noted that even if the statement by Mrs. Griest had the effect of introducing evidence of collateral crime, as Appellant claims that it does, this Court has, in capital cases, regarded such as harmless error, if circumstances warranted it. Compare Johnson v. State, 393 So.2d 1069 (Fla. 1980); Smith v. State, 424 So.2d 726 (Fla. 1982); Waterhouse v. State, 429 So.2d 301 (Fla. 1983). Given the strength of the

evidence discussed above, such circumstances can be said to be found sub judice. The reference to any prior incarceration of Appellant is similar to the situation before this Court in Richardson v. State, 437 So.2d 1091 (Fla. 1983); therein, the prosecutor had asked an overly-broad question of an overly-talkative witness who, in describing her dealings with the defendant on the day in question, informed the jury that he had shaken "his private" at her. This Court noted that the comment was "part of a somewhat rambling answer" and, at most, harmless error. Such could be the holding in this case, and one must note that Appellant himself discouraged the giving of any curative instruction. Compare Sullivan v. State, 303 So.2d 632 (Fla. 1974). Appellant has failed to demonstrate reversible error as to this point and his conviction should be affirmed.

POINT VI

DENIAL OF APPELLANT'S MOTIONS FOR MISTRIAL, MADE AT THE SENTENCING HEARING, WAS NOT ERROR

During the State's argument in the penalty phase, Appellant interposed three motions for mistrial, all of which were denied. Appellant's first motion came when the prosecutor stated, upon discussing the applicability of § 921.141(5)(d) Fla. Stat. (1981), that aggravating factor involving the fact that the murder had been committed during a felony, such as robbery or rape:

> He admittedly robbed her, robbed her at knifepoint of her money, had her back in the closet looking through the safe to see if he could get some more money. He only got thirty dollars. He killed this woman for thirty dollars.
>
> And he says he didn't rape her. He didn't have any sexual intercourse with her. But the evidence would show otherwise. There is his blood type and intact sperm present, which you all heard during the course of the evidentiary phase would not be present if the sexual contact was as long ago as it had been with her husband.
>
> And here she is found nude from the waist down, her underwear and pants and shoes on the floor of the kitchen. And what does that tell you? The man raped her. And yet he comes in here with the audacity to tell us, "I didn't have sex with her." (R 1448)

After an intervening paragraph of argument, Appellant's counsel moved for a mistrial, claiming that the assistant state attorney had impermissibly commented upon his failure to testify and his right to remain silent (R 1449); the motion was denied (R 1449).

Later, when the prosecutor was arguing to the jury the applicability of § 921.141(5)(h) Fla. Stat. (1981), that aggravating factor relating to the fact that the murder was especially heinous, atrocious or cruel, the following comment was made:

> Then we come down to number (h) here, whether or not the crime was especially heinous, atrocious or cruel. And you have heard the facts, and I'm not going to wave those pictures in front of you again. But you know that Anthony Bertolotti stabbed this poor woman fourteen times in the chest alone, and he did it with such force that he broke the first knife off.
>
> And then when he wasn't satisfied that she was dead because she was still moving and she was still making noises, he went to the kitchen. He went to the kitchen and got another knife and stabbed her and finished her off, all of this, we must not forget, after having beat her about the head with that beer stein, strangled her about the neck, choking her.
>
> And if that's not heinous, atrocious and cruel, can anyone imagine any more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life, no lawyers to beg for her life. (R 1451-2).

After the prosecutor had moved on to discuss the application of the next aggravating factor, Appellant's counsel moved again for a mistrial, contending that the prosecutor had been commenting upon Appellant's Sixth Amendment right to counsel (R 1453); this motion was denied (R 1453).

Lastly, after the prosecutor had reviewed all of the potential mitigating factors and the evidence thereon, he proceeded to his summation. The argument concluded as follows:

> Well, in this situation Carol Ward was robbed of her life. She was robbed of her money. But Carol Ward is not the only person that demands justice in this case. The state demands justice. The state demands justice for Anthony Bertolotti.
>
> If this business of the death penalty and the law is to be respected, if it's to have any meaning whatsoever, if Carol Ward is to receive justice and if Anthony Bertolotti is to receive justice, the only appropriate sentence that you can return here is to come right back in this courtroom, to look Anthony Bertolotti right in eye and say, "Anthony Bertolotti, for what you

> did and for what you are, death is the appropriate penalty under the law."
>
> Anything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty. (R 1457-8).

Appellant's counsel again moved for a mistrial, claiming that the argument was improper and constituted an appeal to the sympathy of the jury (R 1458-1459); the motion was denied (R 1459).

Appellant, citing to a number of district court decisions involving prosecutorial argument during the guilt phase of a non-capital trial, contends that these comments cumulatively deprived him of a fair penalty hearing and that his sentence be vacated; it is worth noting that in one of the cases cited by Appellant, Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984), the comments were found to constitute harmless error, in reference to the defendant's grand theft conviction, given the overwhelming weight of the evidence. This Court has frequently held that wide latitude is permitted in arguing to a jury and that the control of comments made therein is within the trial court's discretion, which an appellate court will not disturb, barring an abuse of such discretion. See Thomas v. State, 326 So.2d 413 (Fla. 1975); Breedlove v. State, 413 So.2d 1 (Fla. 1982); Davis v. State, supra. Each case must be considered on its own merits and within the circumstances surrounding the complained-of remarks, see Darden v. State, 329 So.2d 287 (Fla. 1976), and it will not be presumed that a jury is led astray to wrongful verdicts by the impassioned eloquence and illogical pathos of counsel. See Paramore v. State, 229 So.2d 855 (Fla. 1969). In a recent non-capital case, this Court emphasized that prosecutorial error alone would not warrant automatic reversal of a conviction

unless the errors involved were so basic to a fair trial that they had vitiated the entire proceeding. See State v. Murray, 443 So.2d 955 (Fla. 1984).

That simply cannot be said sub judice. By the time that the jury heard the comments at issue, they had already heard overwhelming evidence of Appellant's guilt, including evidence concerning his confessions to the police, his admissions to Mrs. Griest, his blood-stained clothing, his circumstantial presence at the scene and his new-found wealth after the crime. They had heard the State present clear and convincing evidence of at least three statutory aggravating factors, the subject of Point IX, infra, which clearly established Appellant's history of conviction of violent felonies, his commission of a robbery during the instant homicide and the particularly heinous, atrocious and cruel manner in which he had dispatched Mrs. Ward. Balancing this, they had heard what must be regarded as weak evidence going toward non-statutory mitigating factors, such as Appellant's good work habits both in and out of prison and his relationship with his parents. The closing argument of the prosecutor simply did not poison the jury's mind or influence their decision to reach a more severe verdict. Compare Blair v. State, 406 So.2d 1103 (Fla. 1981); Mason v. State, 438 So.2d 374 (Fla. 1983). The comments at issue have nothing in common with those before this Court in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), the only recent capital case in which this Court has vacated the sentence of death on this basis. In Appellee's opinion, only one of the comments at issue is even arguably improper and, to the extent that it is, no reversible error has been demonstrated.

Turning to the first comment, Appellee does not regard such as an impermissible comment upon any failure to testify. The prosecutor was

drawing the jury's attention to what Appellant had said, not what he had failed to say or failed to deny; the prosecutor was drawing the jury's attention to the inconsistency between the medical testimony and Appellant's confession, as to whether or not he had had sex with the victim. Cf. Donovan v. State, 417 So.2d 674 (Fla. 1982). Appellee sees no similarity between the argument at issue and that discussed in the two cases cited by Appellant, David v. State, 369 So.2d 943 (Fla. 1979) and Brazil v. State, 429 So.2d 1339 (Fla. 4th DCA 1983); in the latter case, during the guilt phase of a trial, the prosecutor sought to goad the jury into asking defense counsel a question, which he would be unable to answer, concerning inconsistencies in evidence, pointing out that the State had given the jury everything that there was. There are a number of distinguishing factors between this case and Brazil, including, in the latter case, the trial court's dissatisfaction with its own ruling, or willingness to find the comment at issue to be one involving a defendant's silence; it must further be noted that Appellant's counsel, in contrast to that in Brazil, did not contest the validity of the confession, which included the denial of any rape, and argued to the jury that it was believable (R 1101). The comment sub judice was a permissible one upon the evidence, as it stood, in a sentencing proceeding, and was directed toward a finding that the homicide had been committed during a sexual battery, pursuant to § 921.141(5)(d); inasmuch as the court did not find this in aggravation, Appellee contends that Appellant has failed to demonstrate prejudice in reference to this comment. See Breedlove, supra.

As to the second comment at issue, Appellee is unable to see any "Golden Rule" problem with the statements of the prosecutor, and certainly none on a par with those discussed in the case relied upon by Appel-

lant, Barnes v. State, 58 So.2d 157 (Fla. 1951), wherein the prosecutor asked the jury, "What if it was your wife or your sister or your daughter that this beast was after?". Inasmuch as the fear and emotional strain suffered by a victim prior to death is a legitimate consideration as to the homicide's heinousness, the prosecutor was not acting improperly in asking the jury to consider Mrs. Ward's feelings prior to her murder. See Adams v. State, 412 So.2d 850 (Fla. 1982). If such comment represents the discussion of a distasteful subject, then it must also be recognized that capital homicides are themselves distasteful. See Proffitt v. State, 315 So.2d 461 (Fla. 1975); Darden, supra. The State does, however, recognize that the prosecutor's reference to the absence of lawyers pleading for Mrs. Ward's life bears a resemblance to the comment which this Court found objectionable, but not reversible, in Jennings v. State, 453 So.2d 1109 (Fla. 1984); in Jennings, the prosecutor during the guilt phase alluded to the victim's inability to make a final phonecall. Considering the totality of the evidence against Appellant, and that supporting the advisory verdict, any error in this regard can safely be regarded as harmless. Compare also Johnson v. State, 442 So.2d 185 (Fla.1983), reference to fact that victim's family would be facing holiday season "one short" improper but not reversible; Provence v. State, 337 So.2d 783, 786 (Fla. 1976), judge's response to juror's question unfortunate and ill-considered, but defendant entitled to fair trial and not perfect one.

Lastly, Appellee is unable to discern any error in the prosecutor's exhortation to the jury to return an advisory sentence of death. Similar comments have been found to be permissible by this Court. Compare Gibson v. State, 351 So.2d 948 (Fla. 1977); Breedlove, supra; Davis, supra. There is a difference between impermissibly urging a jury to send a message,

during the guilt phase of a trial, as occurred in the district court decisions relied upon by Appellant, and in the prosecutor urging them to return the sentence which the State advises in a capital sentencing proceeding. Cf. Elledge v. State, 346 So.2d 998 (Fla. 1977). It is possible that the prosecutor was seeking to "toughen up" the jury prior to the argument of defense counsel; Appellant's counsel began by telling the panel,

> ...what we are really talking about is killing somebody. We're not talking about just killing somebody. We're talking about killing that man right there, Anthony Bertolotti (R 1459).

It is not the State's position that two wrongs make a right and it must be noted that the argument above followed the State's. Nevertheless, juries do not kill people, even convicted capital defendants. Given the circumstances, it was not error for the prosecutor to discuss the severity of the death penalty with the jury and to urge them to return it, despite its enormity, if such was the net result of their consideration of the aggravating and mitigating factors. Appellant has failed to demonstrate reversible error as to this or any other portion of the closing argument during the penalty phase. His sentence of death should be affirmed.

POINT VII

DENIAL OF APPELLANT'S REQUESTED JURY INSTRUCTION, DURING THE PENALTY PHASE, WAS NOT ERROR

Appellant drafted a number of proposed jury instructions for use at the penalty phase (R 2311-2314,2320,2321); Judge Stroker granted Appellant's request to instruct them, pursuant to Tedder v. State, 322 So. 2d 908 (F 1975), of the weight which he would accord their advisory verdict (R 2321,1411). One instruction that the judge did not give, however, was allegedly based upon Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), Downs v. State, 386 So.2d 788 (Fla. 1980) and Alvord v. State, 322 So.2d 533 (Fla. 1975). The instruction reads as follows:

> The Death Penalty is warranted only for the most aggravated and unmitigated of crimes. The law does not require that death be imposed in every conviction in which a particular set of facts occur. Thus, even though the factual circumstances may justify the sentence of death, by electricution, this does not prevent you from exercising your reasoned judgment and recommending life imprisonment without eligibility of parole or twenty-five years (R 2312).

When the instructions were discussed in conference, the prosecutor objected to this instruction, finding it to be a less than correct statement of the law and, to the extent that it was not, merely duplicating the standard instruction (R 1408-9). Judge Stroker denied this request for instruction, feeling that there was no need to give it and regarding it as an invasion of the province of the jury (R 1410).

The above observations of the prosecutor and judge were correct. Certainly the proponent of a requested jury instruction bears the burden of demonstrating not only its utility, but also its provenance. Appellee cannot find anything in Chenault or Downs which bears upon this instruction;

while the Alvord decision does contain within it the instruction's second sentence, State v. Dixon, 283 So.2d 1,7 (Fla. 1983) contains only an arguably comparable version of the first sentence, "It is proper, therefore, that the Legislature has chosen to reserve its [the death penalty's] application to only the most aggravated and unmitigated of most serious crimes." Even on appeal, Appellant has never explained where the last sentence, described by the prosecutor as an invitation to a jury pardon, comes from. Appellee contends that this instruction is directly contrary to this Court's holding in Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), and its denial was not error.

The instant instruction is simply another way of telling the jury how to weigh aggravating and mitigating circumstances; the standard jury instruction, which Judge Stroker gave, covered this ground more than adequately (R 1472-1481). Specifically, the jury in this case was told that aggravating factors had to be proven beyond a reasonable doubt (R 1477) and that, should one or more be found, the jury was then to determine whether mitigating circumstances, which did not need to be found beyond a reasonable doubt, existed to outweigh them (R 1473,1476,1477,1478). The jury was particularly advised that should they not find that the aggravating circumstances justified the death penalty, their advisory sentence should be one of life imprisonment without parole for twenty-five years (R 1476). This Court has recently rejected claims of error in regard to the denial of special jury instructions on the subject of weighing aggravating and mitigating circumstances. Compare Jennings, supra; Kennedy v. State, ___So.2d___, Case No. 61,694 (Fla. July 12, 1984)[9 FLW 291]. The jury was correctly instructed sub judice, and Appellant has failed to demonstrate reversible error in regard to the denial of this instruction of dubious distinction. The instant sentence of death should be affirmed.

POINT VIII

ADMISSION INTO EVIDENCE, AT THE PENALTY PHASE, OF THE TESTIMONY OF WITNESSES WARD, DELANCY, AND LENGEL WAS NOT ERROR

During the guilt phase of the trial, the State proffered the testimony of William Ward as to his wife's fear of strangers and her habit or character trait of not opening the door to them or allowing them into the house in his absence (R 1045-1047); the State offered this evidence in rebuttal of the contents of Appellant's first confession, which had represented that the victim had invited him into the house (R 1039-1045). After Judge Stroker indicated that it was a very close question as to admissibility, and that he preferred that it not come in, the State withdrew its proffer (R 1048).

At the sentencing phase of the trial, the State announced that it would again seek to admit Mr. Ward's testimony and the defense objected (R 1281-2); the State contended that the evidence was relevant as to whether or not Appellant had committed a burglary, and thus went toward a showing of that aggravating factor involving the commission of a felony during the homicide, § 921.141(5)(d) Fla. Stat. (1981)(R 1282-3). Judge Stroker ruled that, given the differing evidentiary standards at sentencing hearings, the evidence would be permitted (R 1283); over objection, William Ward testified that his wife was particularly upset by strangers and would not allow them into the house in his absence (R 1356-9).

Also over objection, two Dade County police officers, Joe Delancy and John Lengel, testified concerning Appellant's prior convictions for crimes involving the use or threat of violence to the person (R 1306-1345). Delancy testified concerning Appellant's aggravated battery of Deborah Burns. While Appellant objected on hearsay grounds when Delancy

reiterated what the victim had told him concerning the stabbing (R 1308), the sergeant also testified concerning Appellant's admissions to him, which had taken place following arrest and advisement of Miranda rights (R 1313-1314); the judgment and sentence form admitted into evidence indicated that Appellant had pled guilty to this charge (Sentencing State Exhibit #1). Lengel testified concerning that burglary with an assault and attempted sexual battery of Puralee Hunter. While Appellant objected on hearsay grounds to testimony concerning what Miss Hunter, a deaf mute, had communicated to the detective (R 1327), the officer also testified on the basis of his own investigation of the offense and admissions made to him by Appellant following the latter's arrest (R 1329,1338-1340); the judgment and sentence form admitted into evidence indicated that Appellant pled guilty to these offenses (Sentencing State Exhibit #2).

Appellant contends on appeal that his sentence of death must be vacated because of the admission into evidence of Mr. Ward's testimony and the hearsay testimony Delancy and Lengel. Citing to a civil case and a provision of the evidence code, § 90.404(1) Fla. Stat. (1981), Appellant argues that the "habit" testimony was inadmissible. He also specifically draws this Court's attention to Williams v. State, 308 So.2d 595 (Fla. 1st DCA 1975), wherein the district court observed that testimony of a husband as to his wife's habits was speculative and insufficient standing alone as a basis for conviction; the court was particularly put out that the State had not called the missing wife as a witness. Appellant further contends that the hearsay testimony of the officers became a feature of the sentencing hearing and that, pursuant to Williams v. State, 117 So.2d 473 (Fla. 1960), his death sentence must be vacated.

These points are without merit. As the court below correctly

recognized, § 921.141(1) Fla. Stat. (1981) provides, in part, that evidence may be presented as to any matter which the court deems relevant to the nature of the crime and the character of the defendant, including matters relating to the aggravating and mitigating circumstances; any such evidence which the court deems probative, except that obtained in violation of the constitution, may be received regardless of its admissibility under the exclusionary rules of evidence, providing that the defendant is afforded a fair opportunity to rebut any hearsay. This Court has discussed this statutory provision with favor in such decisions as State v. Dixon, supra, Alvord v. State, supra, and Elledge v. State, supra. Admission of the contested evidence was in complete conformance with the above statute and, indeed, was admitted so that such statute could have the effect desired. Appellant has failed to demonstrate error, reversible or otherwise, in regard to this point.

Evidence of Mrs. Ward's habits was, as the State argued, admissible on the question of whether or not a burglary had occurred. The fact that in one criminal case, the district court regarded arguably comparable evidence as speculative is not of great moment, given the fact that the evidence therein was the sole basis for conviction, not an issue at a sentencing proceeding, and the fact that the missing witness, the wife, was apparently available to testify. Here, the evidence was presented at a sentencing hearing, and went toward only one of the aggravating factors; Appellant's citation to Williams is rather macabre, in that if the State had been able to call Mrs. Ward to testify as to her own habits, the instant proceeding would have been unnecessary. Appellant has failed to demonstrate any basis for excluding this evidence and the trial court did not err in admitting it. See Dixon, supra; Alvord, supra. Parenthetically, inasmuch

as the trial court did not find that the homicide occurred during a burglary, admission of this evidence, even if error, was harmless. Compare Breedlove, supra; Harich v. State, 437 So.2d 1082 (Fla. 1983), admission of suppressed confession at penalty phase harmless error.

Appellant's argument in reference to the hearsay, and his reliance upon Williams, additionally lack merit. In Williams, this Court reversed a conviction because during the guilt phase of a trial the State had overloaded the jury with similar fact evidence. The instant proceeding was, of course, a sentencing hearing, where the purpose was to apprise the jury of the defendant's character. See Elledge. This Court has continuously held that the details of the prior crimes of violence for which a defendant had been convicted are relevant. Elledge, supra; Delap v. State, 440 So.2d 1242 (Fla. 1983). Such details have often included a defendant's prior confessions. Compare Justus v. State, 438 So.2d 358 (Fla. 1983). In this case, the State did not rely entirely upon hearsay in establishing the circumstances of Appellant's prior convictions and, in that Appellant had the opportunity to rebut any hearsay, and has not explained why he did not do so or is unsatisfied with the result, he has failed to demonstrate error. In Perri v. State, 441 So.2d 606 (Fla. 1983), this Court rejected a virtually identical claim of error, wherein the defendant therein complained of the testimony of various police officers as to the circumstances of his prior convictions. Citing to Alvord, this Court found no harm. In that Appellant pled guilty to all of the prior crimes discussed at the sentencing hearing, and confessed to each, his present contention that such evidence was unreliable, being hearsay, is particularly unconvincing, as is his suggestion that all prior victims of crimes must testify at capital penalty phases. The instant sentence of death should be affirmed.

POINT IX

APPELLANT WAS PROPERLY SENTENCED TO DEATH

By a vote of nine to three the sentencing jury returned a recommended sentence of death (R 2322). On April 12, 1984 Judge Stroker rendered his findings of fact. The judge found that three (3) aggravating circumstances applied. Judge Stroker found that the homicide had been committed by one previously convicted of a felony involving the use or threat of violence, see § 921.141(5)(b) Fla. Stat. (1981), that the homicide was committed while Appellant had been engaged in the commission of a robbery, see § 921.141(5)(d) Fla. Stat. (1981) and that the homicide was especially heinous, atrocious or cruel, pursuant to § 921.141(5)(h) Fla. Stat. (1981); in reference to the last finding, the judge wrote:

> After hearing the Defendant's own account of this murder and considering the physical evidence it is difficult for the mind to imagine the horror and pain that Carol Ward must have suffered during the Defendant's clumsy and protracted efforts to kill her. There is no question that she was stripped or forced to disrobe, threatened, bludgeoned[,] strangled and repeatedly stabbed. Her wounds clearly demonstrate that she tried to defend herself. A knife was actually broken from its handle in the first series of stabbings. Because she was 'still moving' the Defendant left the area and then returned with a second knife to continue the stabbing (R 2352).

Judge Stroker then discussed each of the statutory mitigating circumstances, set out in § 921.141(6) Fla. Stat. (1981), and found none to apply; he expressly disbelieved Appellant's claim that the ingestion of a quaalude had substantially impaired his ability to appreciate the criminality of his conduct, pursuant to § 921.141(6)(f) Fla. Stat. (1981). The judge stated that he had searched the record for any non-statutory mitigating factors and that the only factor in evidence which "approached"

a mitigating consideration was the good conduct of Appellant during his incarcerations. Judge Stroker found this factor to be "not particularly noteworthy", and stated that it was clear that the aggravating circumstances far outweighed any mitigating factor. He sentenced Appellant to death (R 2354).

On appeal, Appellant makes a number of contentions, all of them in error. Appellant makes no attack upon two of the aggravating factors, arguing only that the homicide, in which the victim was repeatedly stabbed, bludgeoned and strangled, was not especially heinous, atrocious or cruel; Appellant argues that if he is executed for this crime, Florida's death penalty statute will, presumably, become arbitrary and capricious. Appellant does not argue that any of the statutory mitigating circumstances should have been found, but does contend that one non-statutory, i.e. Appellant's good behavior in prison, was found. Because of this, Appellant submits that his death sentence must fall, in that there exists an improper aggravating and the presence of a mitigating. Rather than asking for this cause to be remanded, Appellant asks this Court to reduce his sentence to life imprisonment. Appellant cites to this Court no precedent in which such course of action has been taken, i.e. a wholesale vacation of sentence, in a situation where two aggravating circumstances clearly exist which are balanced, if that, by one merely "not particularly noteworthy" non-statutory mitigating. Appellee is not suprised by this omission.

Inasmuch as the lynchpin of Appellant's argument is that the instant homicide was not heinous, atrocious or cruel and was "no more shocking than the norm of capital felonies", this contention can be addressed first; it should be noted that Appellant's trial counsel did not argue vehemently against this aggravating factor and seemed to expect the jury to

find it (R 1465-6). In any event, in State v. Dixon, supra and Alvord v. State, supra, this Court initially discussed what the legislature intended in enacting § 921.141(5)(h). This aggravating factor can be found where the actual commission of the capital felony has been accompanied by such additional acts as to set the crime apart from the norm of capital felonies-where a consciousless or pitiless crime which is unnecessarily tortuous to the victim has occurred; this Court has further described "heinous" as meaning extremely wicked or shockingly evil, "atrocious" as meaning outrageously wicked and vile and "cruel" as meaning designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. In Magill v. State, 428 So.2d 649 (Fla. 1983), this Court further observed that no mechanical litmus test exists for determining whether or not this factor is applicable in any given case; instead, the facts must be considered in light of prior cases and a comparing and contrasting process undertaken. Additionally in Jennings v. State, supra, this Court held that the mindset or mental anguish of the victim is important, but not the sole controlling factor, in determining the existence of this aggravating factor; this Court noted that the totality of the circumstances of the incident must be considered.

Applying all of the above tests and considering the factual circumstances of the capital felony at issue sub judice, it is clear that Judge Stroker was correct in finding the murder of Carol Ward to have been particularly heinous, atrocious or cruel. The victim in this case was stabbed fourteen (14) separate times; when the first knife broke, a second was brought into play. From Appellant's confession, it is clear that Mrs. Ward was still alive at this time, trying to get up and "making noise". After Appellant had continued stabbing her, he bludgeoned her with the beer

stein on the neck and head until she finally stopped moving; he also manually strangled her (R 803). Defensive wounds were found on the body, especially the hands, indicating that Mrs. Ward had sought to protect herself from the knife blows, as well as from the beer stein (R 799,801). Even if Mrs. Ward expired five to eight to ten minutes after the first stabbing, such interval of time would have allowed her sufficient terror and knowledge of impending death to set this crime apart from the "norm" of capital felonies. It should be noted that, by this point in time, Mrs. Ward had already complied with all of Appellant's demands. She had given him all of her cash, offered him her jewelry, and rummaged through the family safe; if one believes Appellant, she even offered to have sex with him, stripping off her clothing, in a vain attempt to save her own life. She weighed less than ninety pounds and suffered chronic ill health; she was hardly a physical threat to Appellant and he had held her at knife point the entire time he was in the home. It would seem that prior to the stabbing, Mrs. Ward had begun to pray for Appellant and had told him that she would like to help him and his girlfriend (State's Exhibit #42). In Appellee's opinion, this type of homicide could have served as the inspiration for the enactment of § 921.141(5)(h).

This Court has approved this finding in circumstances roughly comparable to that sub judice, although it must be noted that the facts of each case can be described as unique to some extent. Thus, in Booker v. State, 397 So.2d 910 (Fla. 1981), this Court found the homicide to be heinous, atrocious or cruel wherein an elderly widow was stabbed to death repeatedly and left with knives sticking out of her body; the autopsy revealed that she had been beaten as well. Similarly, in Harris v. State, 438 So.2d 787 (Fla. 1983), this Court upheld this aggravating factor wherein

the victim had died in her own home of multiples stab wounds and had been struck repeatedly with a blunt instrument; the autopsy again revealed the presence of defensive wounds. Compare also Washington v. State, 362 So.2d 658 (Fla. 1978), victim stabbed repeatedly while held down, defenseless, on a bed; McCrae v. State, 395 So.2d 1195 (Fla. 1980), elderly widow found nude from the waist down, brutally beaten about head and chest, agony and horror victim suffered prior to death "evident"; Adams v. State, supra, stangulation found to be heinous, atrocious or cruel due to victim's awareness of impending death; Breedlove, supra, victim killed from single stab wound while asleep in own home; Quince v. State, 414 So.2d 185 (Fla. 1982), elderly victim found bruised, beaten, stabbed and raped; Waterhouse, supra, victim suffered numerous bruises and lacerations, including many defensive wounds, prior to drowning; Mason, supra, victim stabbed through the heart, lived for up to ten minutes, choking on her own blood; Preston v. State, supra, victim's throat slashed, subject to agony of prospect of imminent death; Lemon v. State, __So.2d___, Case No. 63,410 (Fla. July 19, 1984) [9 FLW 308], victim stabbed repeatedly and strangled, knowledge of impending death; Doyle v. State, __So.2d__, Case No. 62,212 (Fla. October 18, 1984) [9 FLW 453], murder by strangulation consistently found to be heinous, atrocious or cruel, because of suffering and victim's awareness of impending death. Applying the test of Magill, and comparing the facts sub judice to those recited above, the finding of heinous, atrocious or cruel was more than warranted.

Appellant does, however, rely on several of this Court's precedents in seeking to upset this finding. Specifically, Appellant contends that Halliwell v. State, 323 So.2d 557 (Fla. 1975), Chambers v. State, 339 So.2d 204 (Fla. 1976), Burch v. State, supra, and Jones v. State, 332 So.2d

615 (Fla. 1976), all indicate that the death sentence sub judice should be vacated. None of these cases are of the slightest benefit to Appellant, although he is not the first in his position to seek to use them to his benefit. Thus, as this Court observed in Arango v. State, 411 So.2d 172 (Fla. 1982), wherein the victim had been repeatedly beaten with a blunt instrument about the face and head and then strangled and shot, the death sentence was vacated in Halliwell because the mutilation to the body had taken place after death; in Williams v. State, 437 So.2d 133 (Fla. 1983), this Court observed that the death sentence was vacated in Chambers, not due to any lack of "heinousness", but due to the fact that the trial court had impermissibly overridden the jury's recommendation of life. Similar motivation impelled this Court's reduction of the death sentence in Jones and Burch, both of which involved jury overrides and the presence of significant mitigating factors. These cases are, thus, inapposite, as are those cases in which this finding has been vacated due to the fact that the victim had suffered an instantaneous death, without suffering or knowledge of his predicament. Compare Clark v. State, 443 So.2d 973 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Finding of this aggravating factor should be approved and, given that fact, the instant sentence of death should be affirmed.

Even if this factor had not been correctly found, Appellee notes, for the sake of argument, that Appellant's sentence of death could still be affirmed. The extent to which any non-statutory mitigating factor was found sub judice is highly questionable. In his sentencing order, Judge Stroker described Appellant's good behavior in prison as the only factor which approached a mitigating consideration. The judge found it to be not particularly noteworthy and stated that it was clear that the aggravating circum-

stances outweighed any mitigating factor (R 2354). Inasmuch as there remain two aggravating factors which Appellant has not attacked, and no statutory or viable non-statutory mitigating factors, any error in finding heinous, atrocious or cruel would be harmless, in that the weighing process would not be affected by its removal. This conclusion is mandated by such prior decisions of this Court as Hargrave v. State, 366 So.2d 1 (Fla. 1978), Brown v. State, 381 So.2d 690 (Fla. 1980), Vaught v. State, supra, Bassett v. State, 449 So.2d 803 (Fla. 1984) and Kennedy v. State, supra. In all of these decisions, the striking of an unnecessary aggravating factor did not result in vacation of the death sentence because, this Court has observed, that it could "know" the result, given the manner in which the trial court discussed the mitigating factor found and the weight placed upon it. Considering the manner in which Judge Stroker referred to Appellant's good behavior while incarcerated, it should be clear that such factor had a virtually non-existent role in any weighing process and that no remand for resentencing would be required, even if Appellant were correct in his attack upon the finding at issue. Compare Brown, supra; Vaught, supra; Bassett, supra.

Finally, no reason exists to disturb the instant sentence of death due to the manner in which the trial judge weighed the evidence as to mitigating factors. As this Court has frequently observed, it is within the province of the sentencing court to determine whether a mitigating circumstance has been proven and the weight to be accorded it. See Riley v. State, 413 So.2d 1173 (Fla. 1982); Daughtery v. State, 419 So.2d 1067 (Fla. 1982); White v. State, 446 So.2d 1031 (Fla. 1984). Given the strong showing of aggravating circumstances sub judice, death was the appropriate sentence. The instant sentence of death should be affirmed.

POINT X

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL

In his last point, Appellant raises arguments concerning the constitutionality of § 921.141 which, he recognizes, "this Court has specifically or impliedly rejected" in the past (Brief of Appellant at 33). These included contentions that the statute is vague on its face and as applied, that it fails to provide for individualize sentencing, that it leads to arbitrary and unreliable application of the death penalty, that it denies equal protection and that this Court fails to perform its reviewing process correctly. Appellant, in light of the previous rulings upon these claims, notes that detailed briefing would be futile.

Appellee agrees. The contentions raised in this point have been resolved by the instant cases, as well as others. See State v. Dixon, 283 So.2d 1 (Fla. 1973); Alford v. State, 307 So.2d 433 (Fla. 1975); Alvord v. State, 322 So.2d 533 (Fla. 1975); Booker v. State, 397 So.2d 910 (Fla. 1981); Lewis v. State, 398 So.2d 432 (Fla. 1981); Tafero, supra; Jent v. State, 408 So.2d 1024 (Fla. 1981); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Peavy v. State, 442 So.2d 200 (Fla. 1983); Clark v. State, 443 So.2d 973 (Fla. 1983); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Proffitt v. Florida, 428 U.S. 279 (1976); Barclay v. Florida, __U.S.__, 103 S.Ct. 3418 (1983). This point is without merit.

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Appellee respectfully prays this Honorable Court affirm the Judgment and Sentence of Death in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery to Brynn Newton, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 30 day of October, 1984.

Of Counsel
Richard B. Martell