IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)
)

CASE NO. 65,318

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee hereby accepts and adopts the Statement of the Case and Facts as presented by the Appellant.

POINT I

THE APPELLANT'S FAILURE TO ATTEND PORTIONS OF HIS CAPITAL TRIAL PRESENTED NO REVERSIBLE ERROR WHERE THAT FAILURE WAS OCCASIONED BY THE APPELLANT'S OWN PHYSICAL REFUSAL TO ATTEND AND HIS KNOWING AND VOLUNTARY WAIVER OF HIS RIGHT TO DO SO; NO REVERSIBLE ERROR HAS BEEN DEMONSTRATED INASMUCH AS THE OVERWHELMING EVIDENCE OF THE APPELLANT'S GUILT RENDERED ANY POTENTIAL ERROR IN HIS FAILURE TO ATTEND PORTIONS OF HIS TRIAL MERELY HARMLESS.

ARGUMENT

The Appellant, through his appellate counsel, for the first time on appeal challenges the propriety of his convictions apparently asserting that his voluntary absence from portions of his capital trial constitute fundamental error justifying reversal. The State disagrees and respectfully asserts that the Appellant's physical refusal to attend trial and his knowing and voluntary relinquishment of his right to so attend clearly rendered his fundamental error claim meritless.

During jury voir dire at the trial itself, the Appellant voiced his wish to be excused from the trial proceedings, and the trial judge himself noted for the record that Peede had requested permission to be absent from the trial proceedings on several occasions (R 253-254, 662-663, 666)[1]. The trial judge in an abundance of caution expressed the Appellant's right to be present during the trial and had

[1](R) refers to the record on appeal; (AB) refers to the Appellant's initial brief.

denied his request to be excused (R 253-254, 662-663). During cross-examination of his ex-wife, Geraldine Peede, the Appellant was responsible for an outburst in the courtroom for which the trial judge felt it necessary to have him removed during the very short period of time in which Peede's counsel cross-examined that witness (R 631-633). The Appellant was returned to the courtroom immediately after the cross-examination and redirect examination of that witness was complete - a very short period of time encompassed by only five pages of the trial transcript (R 633-638). Peede then remained in the courtroom during examination and cross-examination of a number of other witnesses prior to the court's lunch and recess; however, he once again requested the trial judge to allow him to remove himself from the trial proceedings, at which point the trial judge deferred that request until after lunch (R 662-663). When the trial reconvened after lunch, the trial judge noted that he had been advised by Mr. Peede's counsel that the Appellant did not wish to be physically present during the remainder of the trial (R 663-665). The prosecutor expressed concern as to whether this waiver was due to physical illness or constituted a voluntary and intelligent relinquishment of his right to be present (R 665-667). Defense counsel agreed that it would be in the best interests of the court to obtain a personal waiver from the Appellant in order to avoid the possibility of error (R 667-669).

The trial judge then, once again in an abundance of caution, moved the proceedings to the sixth floor of the Orange County Jail in order to personally determine that

Peede's relinquishment of his right to be present during his trial was a knowing and voluntary one uninfluenced by illness or otherwise, to wit:

> (Whereupon, a short recess was taken, after which the following proceedings were had on the sixth floor, Orange County Jail, with all parties present.)
>
> THE COURT: Mr. Peede, we need to talk to you a little bit about the remainder of your trial.
>
> I've talked to your attorneys, in particular, Mr. DuRocher, indicated you are, don't want to participate anymore in the trial in the courtroom. I wanted to make sure this is a voluntary action on your part. And I want to make sure you understand or I understand that you, indeed, do not wish to participate further.
>
> MR. PEEDE: Yes, sir. You know, when I talked to you down in the courtroom I was trying to tell you then I wouldn't be back.
>
> THE COURT: Are you feeling ill? Or is it just a matter you'd rather not be in the trial?
>
> MR. PEEDE: At first I was feeling ill health wise, but, you know, after I had eaten and all, I feel okay health wise; just mentally I can't handle it, I, I just --
>
> THE COURT: Can't handle further participation in the trial you mean?
>
> MR. PEEDE: I don't mean any disrespect to my lawyers or to you or to anybody else.
>
> The whole, you know, the whole thing went against my wishes. And it's just mentally messing with me so bad that I rather not be any part of it. I rather be away from it.
>
> THE COURT: I want you to understand you are waiving your right to be present at all times during the Court proceedings?

MR. PEEDE: Yes, sir, that's fine. That's what I'd like.

THE COURT: You say you're not feeling ill at this time? This is just a decision you're making because it's your desire?

MR. PEEDE: Yes, sir.

THE COURT: Have you been taking any medication or anything else that would interfere with your ability to make clear and intelligent decisions?

MR. PEEDE: I was on medication until the day the trial started or the day that was, the jury was being picked. And then I was taken off of it.

THE COURT: What type of medication was it?

MR. PEEDE: I really didn't know what it was.

THE COURT: Sedative?

MR. PEEDE: At first it was something for depression, and then it was something to relax and sleep.

THE COURT: Buy you haven't had anything that owuld affect your ability to thank clearly or make decisions?

MR. PEEDE: I don't think so.

THE COURT: Anyone threatened you in any way or orfered anything to you to have you not participate any further in this trial?

MR. PEEDE: No, sir.

THE COURT: Has anyone consulted with you at all about this decision? Or is it simply a decision you're making on your own?

MR. PEEDE: It's my own decision.

THE COURT: Sum up by saying you'd rather be in your cell while this is going on?

MR. PEEDE: Yes, sir.

THE COURT: I'll respect your request in that regard.

MR. REIS: [prosecutor] Ask the Court to ask him one other question, whether or not he wishes for his attorneys to continue the proceedings on his behalf in view of his unhappiness with apparently the strategy that's --

MS. SEDGWICK: [prosecutor] I think a more proper way, if a short recess of a couple of hours --

THE COURT: Do you think if we adjourn court for a while and start back up again your thinking would be different about this?

MR. PEEDE: I had rather the trial continue on since the people are here from the other states, and, you know, going to be time consuming and the financial part and all on the State and all, I rather you go ahead and try the matter and get it over with.

THE COURT: Any indication you might be feeling different about this either tomorrow or the next day?

MR. PEEDE: No, sir, I rather you just go ahead and try it.

THE COURT: Mr. DuRocher and Mr. Bronson [defense attorneys] would be proceeding to --

MR. PEEDE: Yes, sir, I realize.

THE COURT: -- to defend you even though you're not there. Is that your desire? Do you want them to continue on?

MR. PEEDE: Yes, sir, I feel they've started the trial, they should finish it.

THE COURT: Anything further?

Thank you, Mr. Peede. You'll be taken back to your cell.

(R 669-673) (underscoring supplied)

After Peede's knowing and voluntary waiver [as virtually conceded by defense counsel at trial (R 674)], the trial judge made

his specific factual findings for the record, holding that Peede's decision not to be present for further trial proceedings was a free and voluntary one not prompted by any illness or outside factors (R 675). The trial judge further noted Mr. Peede's understanding of the ramifications of his decision, i.e., that the trial would go forward without his presence with his attorneys continuing to act on his behalf. The trial judge further determined that Peede's "conscious decision" had been made with a full appreciation of the consequences as a mere exercise of his freedom of choice, and he rejected defense counsel's argument that a mistrial should be granted, noting that if that were the case any individual accused before the court in such a trial would be able to successfully block his prosecution simply by asserting his right not to be present (R 675-676). Finally, the trial court noted that Fla. R. Crim. P. 3.180(b) as placed on the record by defense counsel specifically authorized a trial to continue once begun with the defendant present if that defendant voluntary absented himself from the presence of the court or was removed because of his disruptive conduct during the trial (R 677-678). Finally, the trial judge, as he stated he would, instructed the jury as to the Appellant's free and voluntary decision to no longer participate or be physically present during the trial and cautioned them that this absence was not to be held against the Appellant in any way by the jury inasmuch as it constituted a simple exercise of his right not to be present (R 678-579).

As correctly noted by the trial judge and apparently

overlooked by the Appellant, Fla. R. Crim. P. 3.180(b) does specifically provide for the completion of a trial begun with the defendant present by the trial court if the defendant voluntarily absents himself from the presence of the court or is removed from its presence because of his disruptive conduct during trial. This provision clearly recognizes the right of a defendant in this state to voluntarily absent himself from any portion of the trial if he is present at its beginning. No effort to distinguish felony or capital trials from this provision is evident in the rule itself such that the trial court's reliance on its language should not now be second-guessed.

Although this Court has not in the recent past specifically reached the question as to whether a defendant's voluntary absence during a crutial stage of the trial for a capital offense constitutes error[2], in Lowman v. State, 80 Fla. 18, 85 So. 166 (1920), this Court determined that the voluntary absence of the defendants for portions of their capital trial did not require reversal. The decision of the Lowman Court had a number of apparent bases, including the Court's determination that: the constitution does not expressly require a defendant to be present during the entire time of his trial; the statutory requirement of a defendant's personal presence during a felony trial may be waived; and no reversible error is shown if the defendant's voluntary act in absenting himself constituted mere harmless error with no apparent effect on the

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[2]Herzog v. State, 439 So.2d 1372 (Fla. 1983); Francis v. State, 413 So.2d 1175 (Fla. 1982).

outcome of his case. The Court further noted that the defendants were represented by counsel who were personally present at all of the stages of the trial and that ". . . no right secured by the Constitution that could not be waived has been invaded by the prosecutor" which when considered with the ample evidence sustaining the verdict and the lack of apparent harm to the defendant could justify reversal given Florida's harmless error statute. 85 So. at 170.

Obviously, the Lowman Court did not have for its consideration the specific language of Fla. R. Crim. P. 3.180(b), yet the rationale for the affirmance in Lowman is no less present in this case given the clear, knowing and voluntary relinquishment of his right to be present made by the Appellant; the presence at all times of his attorney during the trial proceedings; and the overwhelming evidence of the Appellant's guilt, including the Appellant's own confessions, the validity of which Peede himself refused to contest and in fact conceded as properly given when he personally withdrew the suppression motion addressed to those confessions just prior to trial (R 321-327). The evidence of the Appellant's guilt is overwhelming as the scientific evidence clearly serves to corroborate Peede's own account of the murder that he perpetrated; accordingly, Peede's knowing and voluntary relinquishment of his right to be present at the trial and the trial judge's acceptance of that waiver, even if somehow erroneous, cannot serve as the basis for reversal given the overwhelming evidence of the Appellant's guilt beyond any reasonable doubt. See, § 924.33, Fla. Stat. (1983); State v. Murray, 443 So.2d

955 (Fla. 1984); Francis v. State, supra. Indeed, the harmless error analysis applied by the federal courts in the face of other alleged constitutional violations is no less applicable in this case. United States v. Hasting, ___ US. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In responding to the challenge of Appellant's appellate counsel, the State has no difficulty in "sincerely" directing him to the portion of the record previously cited as a clear presentation of an "adequate waiver" of Peede's right to be present during portions of his capital trial (AB 15) (R 669-673). Clearly, from the detailed and lengthy examination performed by the trial judge and the free and voluntary responses of the Appellant, a clear showing has been made of an intelligent and voluntarily entered waiver of the Appellant's right to be present at the remainder of the trial. The Appellant has failed to present any basis for a determination that this particular constitutional right (i.e., the right to be present at trial) stands as the sole constitutional entitlement which cannot be freely waived by a citizen exercising a voluntary and informed choice. Indeed, is it not illogical to assert that a defendant can be deprived of his constitutional right to be present at trial merely by engaging in a disorderly manner disruptive of the court proceedings forcing his removal from the courtroom and yet disallow him the right to make the conscious and voluntary choice to absent himself from the proceedings and thereby waive that right? See, Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Jones v. State, 449 So.2d 253 (Fla. 1984). Here,

Peede, as noted by the trial judge, had made it clear that he would no longer participate in the trial and that he would physically resist any effort to bring him into the courtroom (R 667). This attitude, coupled with the Appellant's previous outbursts in the courtroom, certainly demonstrated to the trial judge the hopelessness of trying to obtain the Appellant's presence at trial without disrupting the proceedings since bringing him into the courtroom against his will would in all likelihood only necessitate a later forceful removal. Given this de facto waiver authority vested in disorderely defendants, can it be logically said that a voluntary waiver authority does not exist?

Finally, the reliance placed by Peede's appellate counsel upon an 1884 Supreme Court decision - Hopt v. Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) - for the proposition that the failure to ensure a defendant's presence at each stage of trial where his substantial rights may be affected can amount to a denial of due process is clearly misplaced. The Hopt decision turned upon the fact that a territorial statute (the Criminal Code of Procedure of Utah, § 218) required a defendant's personal presence at a felony trial and failed to allow a defendant to absent himself such that ". . . it was not within the power of the accused, or his counsel to dispense with the statutory requirement as to his personal presence at trial." 110 U.S. at 579, 4 S.Ct. at 204. The provisions of Fla. R. Crim. P. 3.180(b) clearly serve to distinguish this case from Hopt.

POINT II

THE APPELLANT HAS FAILED TO DEMONSTRATE ANY REVERSIBLE ERROR ARISING FROM REPRESENTATION BY COURT-APPOINTED COUNSEL AT TRIAL WHERE THE APPELLANT FAILED TO UNEQUIVOCALLY REJECT APPOINTED COUNSEL AND IN FACT WAIVED HIS RIGHT OF SELF-REPRESENTATION.

ARGUMENT

The Appellant apparently asserts that his first degree murder conviction should be vacated because he was not afforded the right to represent himself at trial as contemplated by Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The State submits however that the Appellant has failed to demonstrate an unequivocal, voluntary, and intelligent election to exercise his right of self-representation and to discharge his appointed counsel for purposes of his trial such that no error justifying reversal of his conviction has been established.

Although Peede's appointed assistant public defender did file a "Motion to Withdraw" wherein he asserted that the Appellant desired to represent himself at trial (R 1039), it is clear that at the hearing on that motion held August 1, 1983, Peede's request to represent himself arose not from any apparent wish to conduct the entire trial in any particular manner but rather from a dispute with his counsel as to whether they should seek a continuance in this case so as to obtain psychiatric examinations of him and to interview a number of witnesses residing in other southern states necessary to prepare for trial (R 1430-1431, 1437-1438). Peede's appointed counsel was clearly

of the opinion that this additional discovery, including the psychiatric examinations of the Appellant for the obvious purposes of evaluating a potential in sanity defense, as well as the interviewing of out-of-state witnesses, was necessary to develop a proper defense such that a continuance was needed; Peede, however, indicated that his "main objection" to his legal counsel was that he simply did not want a continuance because he wanted to "go forward" with his trial and "get it over with" (R 1437-1438). When questioned by the trial judge as to his legal training or his ability to contact the witnesses involved in the case so as to prepare his own defense, Peede stated that he had no previous legal training, that he had never before been in trial, and that his knowledge of trial proceedings was limited to that which he had picked up on television (R 1432-1436). The Appellant further noted that he did not even know many of the witnesses involved in this case nor how to contact them (R 1432-1433). The trial court judge then further questioned the Appellant as to his previous involvement in legal proceedings and his history of mental illness or mental disorder, and Peede noted that his legal experience was limited to one previous plea bargain in California some five years before and explained that, while he had never seen a psychiatrist, he had apparently seen "counselors" (R 1434-1435).

After conducting his inquiry of the Appellant, the trial judge reached the conclusion that Peede, acting as his own counsel, would not be able to "secure a fair trial at all if [he] went on [his] own, at least at this point in time", and he therefore denied appointed counsel's motion to withdraw while at the same time granting the motion for psychological or

psychiatric examination, indicating that the necessary motion for continuance would also be granted (R 1439). In reaching this conclusion, the trial judge noted that although the Appellant had the greatest interest in the disposition of his case he did not feel that he had the capability of preparing for and conducting a defense in the time frame at issue. Id. It is clear from the trial judge's explanation to the Appellant that he was convinced that, inasmuch as Peede's "main objection" to the assistance of counsel was the continuance sought, no true, unequivocal waiver had taken place since in order to prepare a "sufficient defense under the time limitation that we have got right now", the continuance was clearly warranted (R 1438). Obviously, the trial judge was of the impression that Peede did not really wish to conduct his own defense, i.e., to waive his right to the assistance of counsel, but rather that the Appellant had simply voiced a strategical dispute with his counsel over the continuance motion such that no unequivocal rejection of counsel was proven. Indeed, it is clear that Peede's effort to go to trial and "get it over with" would have been legal suicide in that no time would be left to contact, let alone interview, witnesses, and when no psychiatric evaluation could be completed before the trial scheduled only weeks from that point in time.

The trial judge properly refused to allow Peede's apparently half-hearted "suicide" effort and, because of the peculiar circumstances of this case, correctly held that Peede's effort at self-representation would fail to "secure a fair trial" at that point in time. No basis for reversal has been demonstrated. Indeed, the State notes that during the preliminary phases of

the trial prior to the jury voir dire and the taking of testimony the trial court specifically questioned the Appellant as to whether he wished to be represented by his appointed counsel at those proceedings to which he replied affirmatively, to wit:

> MS. SEDGWICK: [prosecutor] Your Honor, I just wanted to put something on the record at this point.
>
> Mr. DuRocher and Mr. Bronson are representing the defendant, Robert Ira Peede. And they're preparing to assist him in doing the voir dire of the jury.
>
> I wanted the Court to inquire as to whether that is the defendant's desire to have them represent him in the trial.
>
> THE COURT: Mr. Peede, Mr. Bronson and Mr. DuRocher have been appointed by the Court to represent you and are available to represent you in these proceedings because of your inability to hire your own attorney.
>
> Is it your desire for them to represent you and assist you in connection with this case?
>
> MR. PEEDE: Yes, sir.

(R 37-38)

Thus, prior to trial the Appellant made it clear that he did not wish to represent himself which was clear evidence that Peede's previous self-representation request was not an unequivocal one as apparently surmised by the trial court. Indeed, it has been noted that a trial court should not quickly infer that a defendant unskilled in the law has waived counsel and opted to conduct his own defense; rather, the trial judge is under a duty to evaluate the circumstances of the request to determine that it is an unequivocal one - a valid concern given the magnitude of the constitutional right involved (to representation of effective counsel) and the danger to the defendant of inadequate

representation. See, Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982); Johnson v. State, 427 So.2d 1103 (Fla. 3d DCA 1983); Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982). Here, it is clear that Peede's self-representation request was not an unequivocal one as evinced by his clear request that appointed counsel assist him at trial.

In addition, Peede's unequivocal pre-trial request for and acceptance of the assistance of his appointed counsel constitutes an obvious waiver and abandonment of his previous half-hearted assertion of his right of self-representation. Brown v. Wainwright, supra.

Peede's waiver of his self-representation right and his acceptance of appointed counsel continued throughout trial as evinced by the total lack of any unequivocal reassertion of his right to self-representation through a request that his counsel be discharged. Indeed, although Peede placed certain disagreements with counsel on the record (which disagreements once again apparently stemmed from the fact that defense counsel was doing more to defend Peede than he wished done), he nevertheless made clear his desire that his appointed counsel continue to represent him during the trial (R 672-673). A review of the record reveals that the Appellant's disagreements with counsel over trial strategy centered upon his wish that certain witnesses, who had provided damaging testimony against him, not be cross-examined (R 605-606, 632-633). One of those witnesses was not cross-examined as defense counsel noted that it was not technically necessary to do so (R 605); however, defense counsel did engage in a very short cross-examination of the other witness - Geraldine Peede - in an obvious attempt to impeach her

by showing her potential ill will toward the Appellant (R 632-635). The State submits that the strategical decisions made by defense counsel that Peede himself had specifically requested represent him at trial do not mandate reversal in this case given the absence of any attempt to unequivocally reassert his right of self-representation and Peede's later reassertion of his wish that his appointed counsel continue to represent him during the trial (R 37-38, 672-673).

Finally, the State submits that any error asserted by the Appellant must be considered harmless when the entire trial transcript and the overwhelming nature of the evidence of Appellant's guilt is considered. It is clear that what conflicts there were between Peede and his counsel were the apparent result of Peede's efforts to undermine his only viable defenses. Obviously, as counsel properly determined, the impeachment of certain witnesses who presented very damaging testimony against Peede was a necessary tactical decision, and Peede's apparent effort to spare the witnesses the rigors of cross-examination would not in any way have aided his defense. His course of conduct in undermining the only apparent avenues of defense available to him was best evidenced by Peede's withdrawal of a suppression motion filed by his counsel addressed to his pre-trial confession (R 321-327). Those confessions, when combined with the physical evidence adduced at trial as well as the other testimony admitted, presented overwhelming evidence of the Appellant's guilt of the first degree murder for which he was charged such that any claim of reversible error because of certain conflicts between the Appellant and the trial counsel whose assistance he requested is unsupported. See, Drake v. State, 441

So.2d 1079 (Fla. 1983); Jones v. State, 332 So.2d 615 (Fla. 1976); § 924.33, Fla. Stat. (1983).

POINT III

THE APPELLANT HAS FAILED TO DEMONSTRATE ANY ABUSE OF DISCRETION OR IMPROPER LIMITATION BY THE TRIAL COURT JUDGE IN ALLOWING TIME FOR CLOSING ARGUMENT; THE APPELLANT HAS FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW.

ARGUMENT

The Appellant's assertion of a "severe time limitation on closing argument" by the trial judge presents no basis for reversal in that that specific issue has not been preserved for appellate review by proper contemporaneous objection or motion and is clearly factually unsupported by the appellate record.

The record reveals that at the end of testimony in the case the trial judge suggested that the closing argument time could be set at thirty (30) minutes per side and then specifically noted that he had "never cut anyone off." Defense counsel responded by noting that he did not expect his argument to go "for an hour or anything like that . . ." and at that point raised no specific objection to the time period suggested by the trial court judge nor did he suggest that more time was needed or make a specific request for more argument time. Furthermore, the transcript of defense counsel's closing argument contains absolutely no suggestion that it was cut short or limited in length in any way by the trial court judge. The fact that Peede's trial counsel perceived no improper and actual limitation on his closing argument and felt that his client suffered no prejudice from the trial court's suggestion is best evinced

by the total lack of any objection/argument on this point addressed to the trial court either before or after closing argument. For example, Peede's new trial motion (filed by his trial counsel) alleges no impropriety based on any limitation of closing argument theory (R 1253-1254). Further, Peede's trial counsel clearly felt it unnecessary to list any claim of improper closing argument limitation in the Statement of Judicial Acts to be Reviewed which he prepared for appellate review purposes (R 1418-1419).

The State submits that the Appellant's failure to raise any objection or motion whatsoever challenging what he now - for the first time on appeal - terms an improper limitation on closing argument at the trial court level so as to allow the trial court to consider and determine the question presented and if necessary correct the putative error (by extending argument time if counsel felt necessary) necessarily precludes appellate review of this issue. See, Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978). Obviously, Peede's trial counsel did not perceive the same "severe time limitation on closing argument" which the Appellant now for the first time feels to have been so prejudicial. Indeed, unlike defense counsel in the cases cited by the Appellant in support of his argument, Peede's trial counsel clearly demonstrated no inability to say whatever he had to say in the time provided.
The Appellant fails to present any specific assertion as to argument that he would have presented but for the "limitation" imposed by the trial judge. Certainly, the Appellant's failure

to even speculate, let alone establish based on record evidence, that the perceived limitation was in any way specifically detrimental to his case clearly fails to meet his burden of proof of making an affirmative showing of such detriment in order to justify relief. See, McDuffee v. State, 55 Fla. 125, 46 So. 721 (1908).

Unlike the cases relied upon by the Appellant, no objection, exception, or motion addressed to the time period for closing argument suggested by the trial judge or request for additional time was ever raised by Peede's trial counsel in this case. See, May v. State, 89 Fla. 78, 103 So. 115 (1925); Neal v. State, 451 So.2d 1058 (Fla. 5th DCA 1984). There is therefore no basis for a determination by this tribunal that the trial judge abused his clear discretion in suggesting what was, based on the facts and circumstances of this case, a reasonable time for closing argument, especially where as here defense counsel voiced no objection, made no request for additional time, and completed his closing argument without interference from the trial judge.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY AT ISSUE; AND, ALTERNATIVELY, THE APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR AND HAS IN FACT FAILED TO PRESERVE FOR APPELLATE REVIEW CERTAIN STATEMENTS NOT CHALLENGED AS IMPROPERLY ADMITTED HEARSAY.

ARGUMENT

Appellant challenges four statements made by the victim's daughter in her testimony at trial as improperly admitted hearsay testimony (AB 24). However, the State initially notes that two of those statements were in fact given at trial without any hearsay objection by the Appellant, to wit:

> Q. [by Mr. Reis - Prosecutor] Did she indicate she was going anywhere other than the airport?
>
> MR. DuROCHER [defense attorney]: Object, leading.
>
> THE COURT: Overruled.
>
> A. [Tanya Dee Bullis - daughter of victim] She said that she was going to pick him up. If she wasn't back by midnight to call the police, she said she may have been forced into the car. She was afraid of being taken to North Carolina.
>
> Q. [by Mr. Reis - Prosecutor] Did she say whey she was afraid?
>
> A. She was afriad of being put with the other people he had threatened to kill. And he'd kill them all on Easter.

(R 599-600)

Given the lack of any specific hearsay objection to the portion of the testimony by the victim's daughter that her mother had

instructed her to call the police if she did not return from the airport by midnight and her mother's statement that the Appellant had threatened to kill others in North Carolina on Easter, the issue now raised by the Appellant with reference to those statements has clearly not been preserved for appellate review. Indeed, it is well established that this Court will not consider initially on appeal matters which have never been presented to nor ruled upon by the trial judge. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Furthermore, those particular statements by the victim's daughter to which a hearsay objection was lodged present no basis for reversal. The fact that Ms. Bullis testified as to her mother's statement that she was going to the airport to pick up the the Appellant, even if hearsay, was of no prejudicial impact given Peede's own admission clearly presented to the jury that he had in fact arranged for the victim to pick him up at the Miami airport and that she did so (R 716-717). Similarly, the daughter's relation of the fact that the victim had stated that she was nervous and scared and thought that she might be in some sort of danger was of no prejudicial impact justifying reversal given Ms. Bullis' own testimony that her mother seemed nervous and scared (R 599) and the unobjected-to testimony (previously noted) that her mother had told her to call the police if she did not return by midnight - clearly indicating to the jury the fact that the victim was indeed nervous and scared and thought that she might be in some danger (R 600). Thus, since the jury was clearly informed of the victim's state of mind, i.e., that she was nervous, scared, and felt herself

to be in some danger from the Appellant through unobjected-to and therefore properly admitted testimony clearly renders the limited statements to which hearsay objections were lodged by the Appellant of no prejudicial import such that no basis for reversal has been demonstrated. § 924.33, Fla. Stat. (1983).

Most importantly, however, the State notes that the various statements of the victim related by her daughter and now (in some cases for the first time) challenged as inadmissible hearsay were in fact properly admitted within the trial court's discretion under the hearsay exception provided by § 90.803(3)(a), Fla. Stat. (1983), as indicative of the declarant's "state of mind."

Under the "state of mind" hearsay exception, the statement showing the declarant's state of mind when it is at issue in a case is admissible as an exception to the hearsay rule. § 90.803(3)(a), Fla. Stat. (1983); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980); VanZant v. State, 372 So.2d 502 (Fla. 1st DCA 1979). Here, the daughter's testimony as to the victim's state of mind immediately before she left to pick up the Appellant at the airport, i.e., the fact that the victim was nervous, scared, thought herself to be in danger as well as the victim's fear that she might be forced into the car by the Appellant and taken to North Carolina to be killed with others threatened by the Appellant were all properly admitted to demonstrate the victim's mental state for purposes of the elements of the kidnapping charge which formed the basis for State's felony murder theory. Obviously, in order to prove that the victim had been kidnapped by the Appellant from the Miami airport it was necessary to demonstrate that she had been forcibly abducted

against her will, an assertion denied by the Appellant. § 787.01 (1)(a), Fla. Stat. (1983). Certainly, the victim's fearful state of mind as related to her daughter just prior to her disappearance as well as the victim's instructions that the police be notified if she did not return by midnight all served to demonstrate that the declarant's state of mind and plan at that point in time was clearly not to voluntarily accompany the Appellant outside of Miami or to North Carolina. Accordingly, the victim's mental state, i.e., whether she intended to voluntarily accompany the Appellant to North Carolina from the Miami airport, was clearly at issue in the kidnapping aspect of the case such that it cannot be said that the trial judge abused his discretion in admitting the testimony at issue. Indeed, it is the kidnapping/felony murder aspect of this case that distinguishes it from the decisions relied upon by the Appellant wherein the "state of mind" exception was rejected based upon their particular factual circumstances. This is not a case wherein the statement of the murder victim to a third party admitted merely demonstrated the defendant's motive or intent to kill the victim in the future. See, Fleming v. State, Case No. 83-930 (Fla. 2d DCA August 24, 1984) [9 FLW 1849]; Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983); Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); Kennedy v. State, supra. Rather, the testimony as to the victim's state of mind admitted in this case was clearly relevant to an issue raised by the kidnapping allegation, i.e., the question as to whether the victim voluntarily accompanied the Appellant to the location where she was ultimately murdered by him. No abuse of discretion/ reversible error has therefore been demonstrated.

POINT V

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PERTAINING TO FELONY MURDER (KIDNAPPING) WHERE SUBSTANTIAL COMPETENT EVIDENCE WAS ADDUCED TO PRESENT A JURY ISSUE; ALTERNATIVELY, THE OVERWHELMING EVIDENCE OF PREMEDITATION ADDUCED (AND UNCHALLENGED BY THE APPELLANT) CLEARLY SUPPORTS HIS FIRST DEGREE MURDER CONVICTION.

ARGUMENT

In response to the Appellant's judgment of acquittal motion challenging the sufficiency of the evidence adduced to support a first degree murder conviction, the prosecutor correctly noted the clear presence of competent substantial evidence of record to support a conviction for premeditated murder or felony murder, and the State hereby incorporates by reference that argument (R 845-846). As noted by the prosecutor, the evidence adduced at trial was sufficient to allow the jury to conclude beyond any reasonable doubt that Darla Peede, the ultimate murder victim, was abducted from Miami by the Appellant and forced to drive her automobile to the vicinity of Orlando, Florida, where she was killed by the Appellant. This determination is supported by the Appellant's own admission that he had initially inflicted a stab wound on the victim while holding his knife at her side as they drove north (R 722). Coupled with this fact is clear evidence that the victim had no intent to leave Dade County with the Appellant as evinced by the fact that she took with her only her purse and did not pack any belongings - clothing or otherwise - as was her custom for such a trip (R 597-598). Furthermore, the victim had

confided to her daughter her fear that she might be abducted and left instructions that she contact police authorities if she failed to return by that evening. Each of these factors, when considered together and in light of the other circumstances in this case, including the defense wounds discovered on the victim as well as the Appellant's apparent plot to utilize Darla Peede in a plan to do harm to others in North Carolina, specifically his ex-wife Geraldine Peede, presented competent substantial evidence sufficient to present a jury question (R 722, 731). Clearly, the jury could well have determined that Peede went to Miami with the intent of forcing the victim Darla Peede to leave Dade County with him, and the circumstances of the victim's departure from Dade County as well as the physical evidence of a stab wound on her side, inflicted as she drove north in the clearly unplanned trip with her husband, certainly supports that conclusion.

Peede's argument that the only proof of guilt of the felony murder (kidnapping) is circumstantial and does not exclude his reasonable hypothesis of innocence, i.e., that she voluntarily accompanied him and that the knife wound to her side was merely his form of reaction to a particular song does not require reversal. Indeed, while circumstantial proof of guilt cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence, the question of whether the evidence fails to exclude all such reasonable hypotheses <u>is for the jury to determine</u>, and where there is substantial competent evidence to support their verdict it will not be reversed. <u>Heiney v. State</u>, 447 So.2d 210 (Fla. 1984);

Rembert v. State, 445 So.2d 337 (Fla. 1984); Huff v. State, 437 So.2d 1087 (Fla. 1983); Rose v. State, 425 So.2d 521 (Fla. 1982). Clearly, the jury as the arbiters of credibility are free to accept and reject portions of a defendant's testimony as with any other witness based upon the surrounding circumstances, logical deductions, and common sense. Here, they could well have rejected as simply unreasonable given the other circumstances in this case the Appellant's assertion that he did not force the victim to accompany him and that the stab wound inflicted upon her side was merely a "reaction to a particular song" (AB 28). Why did the Appellant even have the knife drawn on the victim if not as a show of force to obtain her cooperation in making the trip? Inasmuch as the jury could simply reject the incredible assertion of the Appellant as simply unreasonable, the trial court committed no reversible error in denying Peede's motion for judgment of acquittal. Rembert v. State, supra; Huff v. State, supra.

Alternatively, the State notes that, given the Appellant's admission, corroborated by physical evidence, that he did indeed stab and kill the victim, overwhelming evidence of premeditated first degree murder was presented at trial, and Peede makes no effort to even challenge the accuracy of the evidence to support that alternative theory as a basis for his first degree murder conviction. See, Middleton v. State, 426 So.2d 548 (Fla. 1982). Accordingly, notwithstanding the Appellant's challenge to the sufficiency of the evidence to support a felony murder theory, the overwhelming evidence of guilt on the alternative theory of premeditated murder renders any such

error harmless and precludes reversal of the first degree murder conviction. Indeed, this Court in comparable situations has refused to reverse a first degree murder conviction due to an alleged impropriety in the felony murder theory where the evidence adduced was sufficient to support a conviction under a premeditated murder theory. Blanco v. State, 452 So.2d 520 (Fla. 1984); Moody v. State, 418 So.2d 989 (Fla. 1982); Breedlove v. State, 413 So.2d 1 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982). The decision in Franklin v. State, 403 So.2d 975 (Fla. 1981), relied upon by the Appellant, is clearly distinguishable from the instant case given the overwhelming evidence of premeditation sufficient to satisfy the harmless error test which the Franklin court determined was not satisfied under the peculiar facts of that case.

POINT VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE FLORIDA'S CAPITAL SENTENCING STATUTE UNCONSTITUTIONAL.

ARGUMENT

As the Appellant concedes, each of the constitutional challenges he raises has been previously rejected. In fact, as this Court noted in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Florida's death penalty statute has been repeatedly upheld against claims of denial of due process, equal protection, as well as against assertions that it involves cruel and unusual punishment. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Appellant raises nothing but vague, unspecific, and unsupported assertions that the capital sentencing statutes are constitutionally infirm, and each such assertion should be readily rejected. For example, Peede argues that the statute does not sufficiently define aggravating circumstances; that it fails to provide a standard of proof for evaluating aggravating and mitigating factors; and that it does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and (other unnamed) factors. This Court,

however, has continuously held that the aggravating and mitigating circumstances enumerated in § 921.141 are not vague and provide meaningful restraints and guidelines to the discretion of judge and jury. Lightbourne v. State, supra; State v. Dixon, supra. Furthermore, the constitutionality of the statute and and the mechanics of its operation have been consistently upheld despite numerous and varied challenges. Proffitt v. Florida, supra; Spinkellink v. Wainwright, supra; Ferguson v. State, supra; Alvord v. State, supra.

In addition, Peede's time-worn accusation that the death penalty by electrocution is cruel and unusual or that the failure to require notice of aggravating circumstances as well as the "arbitrary and unreliable application of the death sentence" results in a denial of due process have likewise been consistently rejected. Proffitt v. Florida, supra; Spinkellink v. Wainwright, supra; State v. Dixon, supra.

Similarly, Appellant's arguments that the "cold, calculated, and premeditated" aggravating circumstance outlined in § 921.141(5)(i) makes the death penalty virtually automatic absent a mitigating circumstance is preposterous in light of this Court's consistent and clear pronouncement that such an aggravating factor does not apply in all premeditated murder cases but only under certain factual circumstances. Harris v. State, 438 So.2d 787 (Fla. 1983); Jent v. State, 408 So.2d 1024 (Fla. 1981).

The State submits that the remainder of Peede's hodge-podge of constitutional challenges are equally unsupported, unspecific and without merit. For example, Peede's claim that

a defendant's due process rights are violated by failure to notify him of the aggravating circumstances to be utilized to justify the imposition of the death sentence has been previously raised and disposed of in Sireci v. State, 399 So.2d 964, 965-966 (Fla. 1981); see also, Menendez v. State, 368 So.2d 1278 (Fla. 1979). Indeed, as Peede clearly concedes, each of the constitutional arguments he raises has been clearly or implicitly rejected by this Court and the United States Supreme Court, each of which have upheld both the underlying statutory framework for the imposition of a death sentence and the actual application of that process. Accordingly, the Appellant's various vague allegations attacking the facial constitutionality of the statute as well as its operation should be rejected as without legal or factual support. Indeed, like Peede's contention that this Court has abandoned its duty to make an independent determination of whether or not the death penalty has been properly imposed, the various contentions raised by the Appellant are totally without evidentiary support or legal basis.

POINT VII

THE METHOD FOR IMPOSING SENTENCE UNDER FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL; THE PARTICULAR CONSTITUTIONAL CHALLENGE NOW RAISED BY THE APPELLANT HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW.

ARGUMENT

Peede challenges, for the first time on appeal, the constitutionality of Florida's capital sentencing statute asserting that a defendant is denied his Sixth Amendment right to a jury trial by his peers because the trial judge in sentencing the defendant makes written findings as to whether the aggravating and mitigating circumstances at issue have been proven. The Appellant presents absolutely no statutory, constitutional, or decisional authority for his assertion that this sentencing procedure violates any specific constitutional proscription. Indeed, Florida's capital sentencing statute has been specifically determined to pass constitutional muster in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), wherein the Court clearly addressed the fact that the trial judge was required to render factual findings as to the aggravating and mitigating factors at issue and was the final determiner of sentence, notwithstanding the jury's advisory recommendation. The Supreme Court recognized the difference between the roles of the trial judge and jury in the sentencing process but noted that it had "never suggested that jury sentencing is constitutionally required." Id., 96 S.Ct. at 2966, 428 U.S. at 252.

The Appellant's Sixth Amendment argument is clearly misdirected for his right to a jury trial on the substantive murder offense has not been abridged under the statute, and he was in fact afforded the jury trial right guaranteed to him by the constitution resulting in the unanimous conclusion by his jury of peers that he was guilty of the first degree murder charged. Inasmuch as there is no requirement whatsoever for jury input at the sentencing phase, Peede's constitutional challenge is clearly misplaced; indeed, his assertion that in the sentencing context the burden of proof as to aggravating and mitigating circumstances falls within the provence of the jury is totally unsupported by this statute and unrequired by any state or federal constitutional provision.

Alternatively, the State notes that the constitutional challenge now raised by Peede was never presented to the trial court below by appropriate motion or objection such that the challenge to the constitutionality of the statute as applied, now raised, has not been preserved for appellate review. See, Fla. R. Crim. P. 3.190(b,c); Trushin v. State, 425 So.2d 1126 (Fla. 1982); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

POINT VIII

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN FINDING THAT THE MURDER PERPETRATED BY THE APPELLANT WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

ARGUMENT

Upon the bases and for the reasons more specifically stated in Point IX of this brief, the State submits that the sentencing judge did not err in finding that the murder perpetrated by the Appellant was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The evidence more specifically recited in Point IX herein clearly supports this conclusion and his specific finding of fact with reference to the Appellant's plot to utilize the victim in his apparent plan to kill her along with his ex-wife, Geraldine Peede, and Calvin Wagner was amply detailed in the trial judge's sentencing order and specific findings of fact in support thereof (R 1264). This is not a case comparable to Hall v. State, 381 So.2d 683 (Fla. 1980), inasmuch as there was no jury recommendation of life such that the Tedder[3] standard of review is inapplicable; i.e., it was not necessary for the sentencing to set forth specific clear and convincing facts justifying a jury override. Here, the sentencing judge has set forth in writing his reasons for imposing the death sentence in accord with the jury recommendation and, as noted by the State in Point IX herein, that rationale

[3] Tedder v. State, 322 So.2d 908 (Fla. 1975).

clearly supports the death penalty imposed. Peede's claim that the trial judge's finding is too unspecific and does not provide for meaningful review is clearly undermined by the arguments presented by the Appellant in Point IX of his brief (AB 38-40) to the effect that the evidence adduced at trial and at the sentencing hearing did not support that factual determination.

Finally, as noted in Point IX herein, even if it could be said that the third aggravating circumstance applied by the sentencing judge was improper, remand for new sentencing is unnecessary in this case in light of the trial court's express conclusion that the first aggravating circumstance determined - i.e., that the Appellant had been previously convicted of two felony crimes involving a previous murder conviction - was in and of itself of such significance to outweigh the only marginally established mitigating circumstance (R 1265); Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984). Certainly, given the unchallenged applicability of an aggravating circumstance which the sentencing judge deemed sufficient in and of itself to justify the imposition of the death penalty under the circumstances of this case, and the proper determination that at least one other aggravating circumstance existed, i.e., the fact that the murder was perpetrated during the commission of the kidnapping, no basis for a remand for resentencing is presented even if the third aggravating circumstance is determined to have been erroneously applied. See, Bassett v. State, 449 So.2d 803, 808 (Fla. 1984).

POINT IX

THE TRIAL COURT PROPERLY IMPOSED THE DEATH SENTENCE IN ACCORDANCE WITH THE JURY'S RECOMMENDATION UPON ITS DETERMINATION THAT THE AGGRAVATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE OUTWEIGHED THE MITIGATING CIRCUMSTANCE APPLIED.

ARGUMENT

At the sentencing hearing, both the State and the Appellant presented limited evidence as to aggravating and mitigating factors (R 927-959). The State's evidence was limited to proof of the Appellant's involvement in two prior felonies in the State of California to which he pled guilty and was convicted (R 927-936, 938-945). Those convictions were for second degree murder involving the use of a firearm and for assault with a deadly weapon (R 929).

The Appellant's sentencing evidence was limited to testimony from Dr. Robert Kirkland, a psychiatrist, with reference to the Appellant's mental state at the time of the murder he perpetrated as well as certain correspondence to the court on the Appellant's behalf from a number of individuals (R 948-953, 956-958) (Defense Exhibit No. 1 - Index of Evidence).

The jury after considering the evidence presented at the sentencing proceeding and the argument of counsel deliberated for a period of only forty (40) minutes before returning with a recommendation that the trial judge impose the death penalty based upon their eleven (11) to one (1) vote (R 974-975, 1247). The trial judge agreed with the jury's recommendation

and imposed the death sentence, determining that three aggravating factors had been proven beyond a reasonable doubt, to wit: (1) the defendant was previously convicted of two prior felony offenses involving the use or threat of violence to other persons; (2) the capital felony was committed while Peede was engaged in the commission of the kidnapping of the victim; and (3) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 980, 1263-1264). The sentencing judge, applying Dr. Kirkland's testimony with the "benefit of the doubt" in favor of the Appellant, also determined that the murder was committed while Peede was under the influence of extreme mental or emotional disturbance; however, the trial court made clear that this "marginal mitigating circumstance" was sufficiently outweighed by the single aggravating circumstance of the defendant's prior convictions for second degree murder and assault with a deadly weapon (R 1264-1265). Furthermore, the trial judge specifically stated that he had reviewed the evidence presented vis-a-vis the statutory mitigating circumstances as well as the non-statutory mitigating circumstances asserted (i.e., the letters presented by the Appellant on his behalf) and rejected them as unestablished by the proof adduced (R 979-981, 1264-1265). Finally, the sentencing judge determined that, after weighing the aggravating and mitigating circumstances, the sentence of death was mandated based upon his finding that sufficient aggravating circumstances had been established to outweigh the single mitigating circumstance (R 1265).

(1) THE APPELLANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON - § 921.141(5)(b), FLA. STAT. (1983).

Upon the proof adduced at the sentencing hearing, the trial judge correctly determined that Peede had previously been convicted of two felonies involving the use or threat of violence to other persons based upon his 1978 convictions for second degree murder and assault with a deadly weapon (R 1263). The Appellant concedes the viability of this aggravating circumstance inasmuch as this finding is supported by competent substantial evidence of record (AB 38). Accordingly, the sentence of death recommended by the jury and adopted by the trial court judge should be considered correctly applied since, as stated by the trial judge, this "single aggravating circumstance, standing alone" was sufficient to outweigh the single "marginal mitigating circumstance" found to have been established (R 1265). Accordingly, even if this Court were to hold that the other two aggravating circumstances determined by the trial court judge were not established by the evidence, the single remaining aggravating circumstance - which the Appellant concedes is supported by competent substantial evidence of record - should be considered adequate to support the death penalty imposed given the sentencing court's unequivocal determination that the mitigating circumstance found to exist was nevertheless outweighed by that single aggravating factor. Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984); see also, Bassett v. State, 449 So.2d 803, 808 (Fla. 1984). No basis for reversal exists where, as here, the judge fulfilled his duty of conducting a reasoned weighing of the circumstances

and determined that the marginally established mitigating circumstance did not outweigh the fact that Peede had previously perpetrated felonies involving the use or threat of violence to others and had in fact been previously convicted of murder. See, White v. State, 403 So.2d 331 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978); State v. Dixon, 283 So.2d 1 (Fla. 1973).

(2) THE CAPITAL FELONY WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED IN THE COMMISSION OF A KIDNAPPING - § 921.141 (5)(d), FLA. STAT. (1983).

As previously noted in Point V herein, the evidence adduced at trial provided competent substantial evidence sufficient to support a determination by the sentencing judge, as well as the jury, that the murder perpetrated by the Appellant occurred during the kidnapping of the victim from the Miami area (R 1264). The facts adduced at trial in support of a finding of kidnapping had been previously presented to the trial court judge by the prosecutor in response to the Appellant's motion for judgment of acquittal which the judge denied, clearly indicating his realization that said proof constituted competent substantial evidence upon which the jury could determine that the victim had been forced at knife point and against her will to accompany the Appellant to the point where she was ultimately murdered by him (R 845-846). Certainly, the evidence presented at trial (and specifically considered by the sentencing judge) as recounted by the prosecutor when considered in conjunction with the proof from Peede's own confession that his plan was to take the victim from Florida

to North Carolina for the purpose of using her to facilitate his commission of the murders of two other individuals - his ex-wife Geraldine Peede, and one Calvin Wagner, provides adequate, competent and substantial evidence to support the judge's finding of that aggravating circumstance. This Court has made it clear that its concern on evidentiary matters with relevance to the establishment of aggravating and mitigating circumstances does not involve weighing or reevaluating the evidence adduced but is instead limited to a determination as to whether there was sufficient and competent evidence of record upon which to support the trial judge's findings. Card v. State, 453 So.2d 17 (Fla. 1984); Quince v. State, 414 So.2d 185 (Fla. 1982); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Applying this standard, this Court should not now substitute its judgment for that of the lower court given the obvious competent and substantial evidence of record supporting it.

> (3) THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION - § 921.141(5)(i), FLA. STAT. (1983).

As the Appellant correctly notes, the sentencing court may determine that the aggravating circumstance of cold, calculated and premeditated murder applies where the evidence reveals an "execution-style" killing, exhibiting a heightened premeditation greater than that required to establish premeditated murder. Gorham v. State, 454 So.2d 556 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983); Jent v. State, 408 So.2d 1024 (Fla. 1981). As noted by the trial judge, the evidence adduced at trial and most specifically Peede's own

confession revealed that Peede had become convinced that he had seen nude photographs of the victim and his ex-wife, Geraldine Peede, in certain "swinger magazines" and that this concern led him to look through further magazines, later discovering what he decided was a picture of the victim, his ex-wife, and one Calvin Wagner together (R 721-722). As the sentencing judge correctly noted, the content of Peede's confession as related at trial further revealed the Appellant's intent to utilize the vicitm, Darla Peede, as a lure to bring his ex-wife, Geraldine Peede, and Calvin Wagner to a motel where he could kill them. Peede noted that Wagner and Geraldine Peede were afraid of him such that it would be necessary to go to Miami and bring Darla back to set the trap to get close enough to the other two (R 722-723, 1264).

The Appellant's detailing of his murder plot, when considered in conjunction with the clear (previously noted) evidence as to his forceful kidnapping at knife point of the victim, Darla Peede, from Miami; her ultimate murder at the hands of the Appellant; and the Appellant's continuing intention (as related to police in his confession) to complete his vengeance after perpetrating the murder at issue by returning to North Carolina and killing Geraldine Peede and Calvin Wagner; adequately serves to support the trial judge's conclusion that the instant murder was perpetrated in a cold, calculated and premeditated manner without any moral or legal justification. Obviously, the sentencing judge could properly determine - notwithstanding the Appellant's assertion to the contrary - that Peede in fact intended

to kill the victim, Geraldine Peede, and Calvin Wagner for the transgressions that he perceived they had made against him, i.e., their participation in "swinger" activities, including posing nude together for magazine photographs. The record reveals competent substantial evidence in support of the sentencing judge's conclusion such that this Court should not now substitute its judgment for that of the trial court judge as finder-of-fact.

Peede further argues that the sentencing judge erred in finding only one mitigating circumstance to have been established, i.e., that the murder was committed while the Appellant was under the influence of extreme mental or emotional disturbance. The State disagrees.

Specifically, the Appellant, rereciting the evidence that was adduced at the sentencing hearing, asserts the applicabilty of only one other statututory mitigating circumstance, i.e., that the capacity of the Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(f), Fla. Stat. (1983). However, the State notes that Dr. Kirkland, the psychiatrist called by the Appellant to testify at the sentencing proceeding, stated that in his expert opinion Peede was, at the time of the murder, cognizant of his actions, aware of the consequences of the murder, and that he had sufficient mental capacity to conform his conduct to the requirements of law (R 955-956). The sentencing judge specifically noted this testimony in the sentencing order wherein he rejected all statutory and non-statutory mitigating factors other than the influence of extreme mental or emotional disturbance which he

determined to have been marginally established giving the Appellant the "benefit of the doubt" (R 1264-1265).

As this Court has consistently held, it is within the trial court's province to decide whether a mitigating circumstance has been proven. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Riley v. State, 413 So.2d 1173 (Fla. 1982). Indeed, there is no requirement that a trial judge find anything in mitigation, or that he consider all factors advanced; furthermore, the mere disagreement with the force to be given evidence adduced is an insufficient basis for challenging the sentence imposed. Porter v. State, 429 So.2d 293 (Fla. 1983); Quince v. State, supra.

In this case, the sentencing order rendered by the trial judge clearly reveals on its face that, after considering the evidence presented both at trial and at the sentencing proceeding - including certain letters presented on behalf of the Appellant - only a single statutory mitigating circumstance had been marginally established and that no non-statutory mitigating factor had been proven (R 1264-1265). These determinations by the trial judge are clearly supported by the record and make readily apparent that the sentencing judge did consider all possible mitigating circumstances - statutory and non-statutory - in his evaluation of the evidence presented such that no basis for reversal has been demonstrated. Furthermore, the Appellant's apparent challenge to the lack of jury instructions on each specific statutory mitigating circumstance, and

specifically the question as to the Appellant's capacity to appreciate the criminality of his conduct and to conform it to the requirements of law, does not present reversible error given the fact that this question has clearly not been preserved for appellate review by timely objection or request for jury instruction. See, Bottoson v. State, 443 So.2d 962 (Fla. 1983); Jones v. State, 411 So.2d 165 (Fla. 1982); Demps v. State, 395 So.2d 501 (Fla. 1981). Furthermore, given the total lack of evidence of any substantially impaired capacity on the Appellant's part to appreciate the criminality of his conduct and conform it to the requirements of law as well as the other statutory mitigating factors contained in § 921.141(6), Fla. Stat., no basis for vacating the death penalty in this case exists.

Finally, the State submits that the trial judge, after considering the eleven (11) to one (1) jury recommendation of the death penalty, properly imposed the death sentence upon his determination that the three aggravating circumstances established outweighed the single mitigating circumstance, marginally established. See, Mann v. State, 453 So.2d 784 (Fla. 1984); Adams v. State, 412 So.2d 850 (Fla. 1982). Indeed, as previously noted the trial judge made it clear that the Appellant's previous felony convictions involving the use or threat of violence, standing alone, were sufficient to outweigh the "marginal mitigating circumstance" established and to justify the death penalty which was recommended overwhelmingly by the jury (R 1265). Peede fails to even assert any non-statutory mitigating factor overlooked, nor does he reveal any statutory mitigating factor, supported by the evidence adduced which the trial

judge improperly failed to apply so as to justify rejection of the sentencing court's carefully rendered "reasoned judgment" as the scale in the statutory weighing process. Bassett v. State, 449 So.2d 803 (Fla. 1984); Lightbourne v. State, 438 So.2d 380 (Fla. 1983).

CONCLUSION

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

Respectfully submitted,

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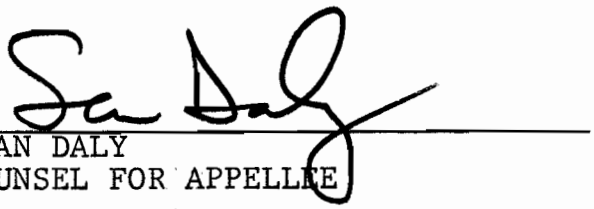
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Larry B. Henderson, Assistant Public Defender for Appellant (1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014), this 30th day of October, 1984.



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