IN THE

SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,525

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF FACTS

Mary Woodville Browning Hammond, an eighty-four year old woman who lived alone, was last seen alive by her granddaughter on November 4, 1983, at 10:45 p.m. Approximately four hours later, her body was found in an upstairs bedroom of her apartment (R 489).

The appellant, David Eugene Johnston, spent approximately three weeks working on a demolition project on a site near the victim's home (R 667, 669). During that period of time, although Johnston was not directly seen in contact with the victim, he nevertheless related to the construction boss that he had some contact with the victim (R 670). He was seen in the victim's apartment at approximately 7:30 p.m. on the Halloween night preceding the murder washing dishes (R 473). The victim spoke of Johnston to her daughter on November 3rd and 4th, 1983 (R 672).

The events leading up to the murder are as follows. During the early evening hours of November 4, 1983, Johnston, along with two friends--Farron Martin and Jose Mena--went to a shopping mall where Johnston bought a puppy (R 702). The puppy was taken back to Martin's apartment, with whom Johnston was living, and the three men went back to a movie (R 703), returning to the apartment a little before midnight (R 705). Johnston then left the apartment wearing a pair of blue jeans and a football jersey (R 706).

Johnston was next seen at a 7-11 store six or seven

blocks from the Martin apartment (R 713) by his girlfriend Patricia Mann, who worked there (R 570). At that time, he was wearing red shorts, a red shirt and tennis shoes (R 70). He left on a bicycle at approximately 12:30 a.m. (R 570).

At 1:45 a.m. Officer Candelaria responded to a call at the Southern Nights Bar on Bumby Avenue (R 529). He encountered Johnston at that time (R 530), and during discussion, noticed the watch Johnston was wearing (R 531).

Johnston then returned to the 7-11 store between 2:00 and 2:30 a.m. (R 571). He was dressed the same way as his previous visit and was observed wearing a butterfly pendant which his girlfriend had given to him (R 572).

At 3:34 a.m., a police communications specialist received a call on the 911 emergency system from 406 Ridgewood Avenue, the address of the murder victim (R 898). The officer verified the address of origination and the person speaking identified himself as Martin White (R 899). The person stated, "Somebody killed my grandma" and that he had a key to the house (R 899).

Approximately six minutes later, Johnston awakened the victim's granddaughter, who lived next door and told her that her grandmother had been murdered, that he called the police and that they were coming (R 472).

Officer Candelaria, dispatched at approximately 3:45 a.m. (R 518), was the first officer to arrive on the scene (R 519). He encountered Johnston and described his clothing as an orange-colored, net type sleeveless shirt, a pair of

orange-colored shorts, white socks, and a pair of sneakers (R 52). Johnston told him that he knew the victim and had observed the front kitchen light on. Considering this unusual, he investigated and found the front door ajar (R 520). Candelaria entered the apartment, found it in certain disarray, and discovered the victim lying on the bed in an upstairs bedroom (R 521).

Officer Stickley encountered Johnston and described his clothing as red shorts and a red top (R 487). He told her that he found the door to the apartment unlocked and had gone inside. He called out for the victim and received no answer. He moved a fence at the bottom of the stairs, went upstairs, and found the victim (R 494). He told Officer Stickley a second time that he couldn't understand how the burglar had entered through the locked front door that he found (R 495). Johnston was then read his rights and subsequently signed a waiver thereof (R 496). He then told Stickley that he found the door unlocked, had gone inside and drank a few sodas and ate some crackers (R 497). Stickley noticed a red stain on Johnston's tennis shoe, as well as what appeared to be small red dots on his arm (R 498). This observation was repeated by Officer Roberts (R 507) and Candelaria (R 527). Also, Officer Dupuis observed Johnston later at the police department and described his clothing as a red shirt with matching shorts, knee-high socks, and tennis shoes (R 538), and observing what appeared to him to be blood stains on the clothing (R 540, 541).

Officer Kleir identified Johnston as the person at the scene who identified himself as Martin White (R 559, 560). He told Kleir that he had known the victim for two or three years (R 565). The granddaughter, Karen Fritz, heard Johnston tell the police officer that he had known the victim for three years and that he took her to church very often, most recently on the past Wednesday night (R 575).

Other evidence relevant to the issues on appeal is found in the following. When Johnston left his friends, Martin and Mena, earlier that evening, no scratches were apparent (R 706). A scratch was present on his face when Johnston woke up the granddaughter (R 477, 780). A reddish-brown stained butcher-type knife was found between the mattress and the box spring of the victim's bed (R 596). Some silver tableware, flatware, a silver candlestick, a wine bottle, and a brass teapot were found in a pillowcase located in the front-end loader parked at the demolition site (R 673). The butterfly pendant, given to Johnston by Patricia Mann, was found entangled in the victim's hair (R 726). The clothing Johnston was wearing tested positive for blood (R 641-648). Plaster casts of foot prints found directly below the window of the victim's apartment were compared to the designs of Johnston's tennis shoes with the conclusion that the shoes could have made the prints (R 745). A blood-stained watch which was found on the bathroom countertop was identified by Officer Candelaria as appearing to be the same watch he saw Johnston wearing

at the earlier encounter at Southern Nights Bar (R 531). The clothes Johnston was wearing when he left Martin's apartment were later found by Martin in the front seat of Martin's car (R 710). A man's ten-speed bicycle was observed in the driveway next to the apartment building (R 525).

The body of the victim revealed numerous stab wounds as well as evidence of manual strangulation. The cause of death was offered as extensive hemorraging which resulted from the severing of major blood vessels on the right side of the neck (R 728).

Johnston gave police officers a series of recorded statements. The following are brief summaries thereof.

November 5, 1983

Johnston told the police that he thought someone named Jeff Burdett committed the murder (R 2318). He claimed to have met Burdett during the first part of October and that Mrs. Hammond had complained about Burdett trying to date her granddaughter. He always rode by Mrs. Hammond's house to check on "grandma", and, when he noticed that the kitchen light was on and the curtains were not closed, he immediately got off his bike and went to the door which was slightly opened (R 2318). He went in and got a coke out of the refrigerator and then noticed that the living room was messed up. He then went upstairs and hollered out for Mary several times, went into her bedroom, and discovered the body. He immediately called 911 and told the police what happened (R 2319). He

then went next door and alerted the granddaughter. He claimed to have known the victim for three years (R 2320). He noticed a bloody-looking towel or rag in a downstairs bathroom (R 2320). He admitted touching a few things that his prints might be found on them. He said that he told the police department that his name of Hammond and that his "grandmother" had died because she was like a grandma to him (R 2328).

(Johnston called Investigator Mundy on November 10, 1983, leaving a message that he wanted to see him. Mundy went there on the 11th, but no interview was held).

November 17, 1983

In this statement, Johnston told Mundy and Investigator Rey that he wanted to correct the statement that he had previously given (R 233). Johnston told the investigators that the severe scratches he had on his neck and face came from the puppy he bought (R 2331). This statement included the trip with his friends to the movies, the trip to see Patricia Mann at the 7-11 store, and the different fact that he just happened to be going by Mary Hammond's house after leaving the 7-11 store (R 2331). In this statement, the door was again unlocked when he got there, and when he went upstairs, Mary was alive (R 2332). He went over to her and grabbed her hair with his right hand, and she tried to speak, but Johnston could not understand her (R 2332). This statement added the fact that he went into a bathroom and washed his right hand and noticed a watch at the sink (R 2332). He went to another

bathroom and washed his arm and wiped it with a towel (R 2332). He stated that he didn't notice any blood whatsoever on his clothing and made reference to the "affidavit report" (R 2332). He explained the usage of the name "Martin White", acknowledged that the police had found the blue pillowcase, and offered an explanation for that (R 2333). He claimed that he lied to the officers by telling them that he never stayed with the victim. He claimed to have stayed with her several times, doing many things for her (R 2332). He stated that the victim never, ever slept alone without a butcher knife being right there on the windowsill (R 2333). Again referring to the "affidavit", Johnston disclaimed ownership of the watch found at the sink, stating that his watch was a "black disco watch" (R 2336). He stated that he had no necklaces and that the last one he ever owned was a "girl sitting on a swing, and I gave that to Pat" (R 2337), and another apparently shaped like a heart which he gave to Sherry, a friend of his. He had never heard of or seen a gold chain with a piece of glass with a butterfly inside it (R 2337).

December 6, 1983

Johnston again called the police, and in response thereto, Investigator Mundy and Investigator Keefe taped another interview. In this statement, Johnston revealed the existence of someone running out of the apartment (R 2341). He gave a description of the individual, and, because he was under the influence of drugs and alcohol,he could not catch

him, but only could watch as the individual ran to Eola Park (R 2341). This time he described the watch that the officer saw earlier that night as a bracelet obstensibly given to him by one Clyde Johnston (R 2341). He lost that bracelet somewhere on Ridgewood (R 2342). This time he did not wash in the upstairs bathroom (R 2342). Johnston offered as the reason for failing to reveal the existence of this unknown person as his fear and that he was a mental patient (R 2343). He also said that he found the teapot and silverware approximately one week or two weeks before the murder (R 2344). Johnston specifically disclaimed ownership of the watch a third time (R 2346), and he referred to the necklace that the police found as being the one he gave to Mary Hammond (R 2346).

December 19, 1983

Again, Johnston called the police department and asked Investigator Mundy to come and speak with him (R 800). In this statement, Johnston recalled the existence of a letter in his lawyer's possession that stated he didn't kill the victim (R 2352). The killer was identified as "Sissy" (R 2353), a black male whose real name is Kevin Williams (R 2353). (Kevin Williams was called from Wichita, Kansas, as a state's witness at trial. He testified that he left Orlando on Halloween Day of 1983 (R 881). He specifically denied writing any letters either to Johnston or Attorney Cotter.) He repeated that he gave the butterfly necklace to Mary Hammond (R 2353). This time when Johnston approached Hammond's house he noticed a

hole in the top part of a window (R 2357). He described the condition of the kitchen and noted glass and dirt on the counter with a cement-looking rock present (R 2357). In this statement, Johnston admitted ownership of the watch (R 2358). He also admitted taking the teapot and some silverware (R 2359). He put those items in a pillowcase taken from a pillow off the couch and put them on the bulldozer (front-end loader)(R 2359).

January 5, 1984

This statement was secured when two investigators responded to a theft reported by Johnston of property belonging to him (R 807). Johnston discussed the theft and then indicated to Investigator Morgan that he wanted to talk about the homicide (R 809). In this statement, Johnston revealed that, when he walked into Mrs. Hammond's bedroom, he saw a white-handled knife on the floor. He picked it up, straightened the crooked blade and threw it on the bed (R 2369). He then went into a detailed explanation of the drugs he had taken that evening and the effects they were having on him. When asked if it were possible that the drugs caused him to believe that he was being attacked by a demon and in response got the knife and attacked to protect himself, Johnston stated, "No, I've got to say better sense than that" (R 2372). Johnston then stated that he put the knife under the mattress (R 2374).

Johnston gave another statement to Investigator Mundy which contained the same basic statement as those given to Investigator Morgan on that same day (R 822).

SUMMARY OF ARGUMENT

POINT I

By virtue of the supplemental record, no issue was either created or preserved below regarding appellant's motion to voir dire the grand jurors.

POINTS II, III, IV, V, VI, IX, XIII, XIX

Points II, III, IV, V, Vi, IX, XIII, and XIX were raised and rejected in Medina v. State, 466 So.2d 1046 (Fla. 1985) at 1048, n. 2.

POINT VII

The letters appellant wrote were not privileged within the meaning of section 90.502 (2), Florida Statutes (1983). In any event, appellant failed to object to the witness's testimony.

POINT VIII

The indictment was clearly and completely worded such that it did not in any way confuse, mislead, or embarrass appellant in the preparation of his defense.

POINT X

Appellant failed to demonstrate that he was entitled to represent himself at trial.

POINT XI

Appellant's motion for judgment of acquittal was legally insufficient. However, the evidence presented by the state at that point in trial was more than sufficient to withstand the motion.

POINT XII

The witness' statements were not so prejudicial so as to have deprived appellant of a fundamentally fair trial.

POINT XIV

By failing to attempt to back-strike a previously sworn juror, appellant has not properly preserved the issue for appellate review.

POINT XV

The questions asked of the state witnesses were proper since the subjects thereof were raised on cross-examination.

POINT XVI

The sole photograph that was introduced was relevant and its relevancy is not outweighed by any notion of gruesomeness.

POINT XVII

That the witness testified that he ran a test on appellant's clothing and that the results were presumptively positive for blood was admissible testimony.

POINT XVIII

A trial court is not required to instruct on the offenses of aggravated battery, battery and assault in a first degree murder trial.

POINT XX

By failing to object or move for a mistrial identifying the particular remarks deemed objectionable, appellant has waived the right to raise this point on appeal.

POINT XXI

By failing to object to either the witness's testimony or the prosecutor's argument, appellant has failed to preserve the point on appeal.

POINT XXII

The evidence was sufficient to support the three findings in aggravation and although factors in mitigation were considered, they were found not to exist to the point of outweighing the factors in aggravation. The sentence of death was properly imposed.

POINT I

THE DENIAL OF APPELLANT'S MOTION TO VOIR DIRE THE GRAND JURORS WAS NOT ERROR.

ARGUMENT

The issue here is one of appellate creation only; it lacks the necessary factual and legal support in the record.

Parenthetically, that counsel for appellant appeared before the grand jury on December 5, 1983, renders the argument directed to the motion for notification meritless. That counsel was present obviously indicates that he was notified.

In the first place, the motion to voir dire individual grand jurors sought that to which appellant was not entitled. Seay v. State, 286 So.2d 532 (Fla. 1973); Porter v. State, 400 So.2d 5(Fla. 1981). Moreover, no point of contention ever materialized below. The supplemental record (R 2512-2516) clearly shows that after the prosecutor and the judge made general inquiry of the grand jurors, counsel for appellant stated: "I believe that is all we were inquiring into the motion on Friday, your Honor". (R 2514) Counsel then thanked he judge for not only allowing him to be present, (Cf. §905.17 Fla. Stat. (1983)) but also for making the inquiry contemplated by the motion. It is clear that since no objection or other form of protest is present at the hearing, appellant received precisely what he wanted and thus, no justiciable issue exists.

POINT II

THE TRIAL COURT PROPERLY DENIED THE MOTION TO PRECLUDE CHALLENGE FOR CAUSE.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, 466 So.2d 1046 (Fla. 1985) at 1048, n. 2.

POINT III

THE TRIAL COURT PROPERLY DENIED THE MOTION TO VACATE DEATH PENALTY.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT IV

THE TRIAL COURT PROPERLY DENIED THE MOTIONS FOR VOIR DIRE.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT V

APPELLANT WAS NOT ENTITLED TO STATEMENT OF AGGRAVATING CIRCUMSTANCES.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT VI

THE TRIAL COURT PROPERLY DENIED THE MOTIONS CONCERNING THE DEATH PENALTY.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT VII

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION IN LIMINE AND TO ENFORCE SECTION 914.04, FLORIDA STATUTES (1983).

ARGUMENT

By virtue of a statement appellant gave to Investigator Mundy on December 19, 1983, the prosecution became aware of a letter which purported to be a confession of the murder with which appellant was charged (R 1318). According to appellant, he received a letter from someone he thought was Kevin Williams , who went by the name of "Sissy", which indicated that Sissy killed the lady on Ridgewood and that he would also kill David (R 1317). Appellant stated that he gave this letter to his attorney, Clyde Wolfe. Appellant also told Patricia Mann that he received a letter from someone confessing to the murder (R 1312). He described the contents of the letter to her and told her that his lawyer had received a copy of it (R 1313).

For rather obvious reasons, the state caused to be issued two subpoenas duces tecum to both attorneys, Wolfe and Cotter, seeking any written statement which purported to be a confession to the killing of the victim by any person other than appellant (R 1933).

Appellant filed a motion to quash the subpoenas or alternatively to enter a protective order (R 1936) and, after a hearing, that motion was denied. The order of denial was

predicated upon a factual stipulation as well as findings by the court, including that the letters were evidence in the case (R 1321, 1983) and that appellant had not treated the letters confidentially since he told the police of their existence and his girlfriend of their contents (R 1321, 1983). (Appellant tells us that further review of that order in the district court of appeal was unsuccessful. He does not now argue that the denial was erroneous. Instead, he focuses on the denials of his subsequent motions.)

In a later statement to Investigator Mundy on January 25, 1984, appellant revealed that he had written both letters (R 824). The record does not reveal when appellant's counsel became aware of this fact, but we think it safe to assume that appellant's authorship of the letters became quickly apparent. Consequently, a motion to invoke statutory immunity was filed seeking a court order granting ". . . use of immunity of the materials which defense counsel was compelled to produce by subpoena dues tecum . . ." (R 2227). Subsequently, a motion in limine was filed seeking to limit the state from introducing into evidence the statement of appellant taken on December 19, 1983 (R 2284).

Appellant's contention is that, since the letters were sent to his attorneys for their own personal viewing, the documents then became subject to the attorney/client privilege (Appellant's brief, p.30). Proceeding on this premise, he claims that the issuance of a subpoena to his attorney

was equivalent to issuance to him personally, and thus, once he was compelled, through his attorney, to produce the letters, section 914.04, Florida Statutes (1983), was activated and the immunity thus created required the trial court to grant his motions.

We disagree for the following reasons. Preliminarily, we offer the general statement that on December 19, 1983, any evidence in anyone's possession indicating the identity of the murderer, especially a purported confession, was a legitimate and necessary object of investigation by the authorities. As far as the state knew at that time, the letter could have completely exornerated the man they were holding for the charge. The fact that such evidence was in the possession of an attorney did not necessarily create some barrier to its discoverability.

Although the trial court found the existence of an attorney/client relationship, it must be determined whether the "communication" was privileged.

Section 90.502(2) Florida Statutes (1983), creates a privilege to refuse to disclose the contents of confidential communications. Subsection (1)(c) defines a confidential communication as one not intending to be disclosed to third persons. The existence of the letter was revealed to Investigator Mundy, and the contents of the letter was revealed to Patricia Mann. Obviously therefore, the appellant cannot claim that what he "communicated" to his lawyers was intended

to be confidential, private, or in any way privileged. As this court noted in Mobley v. State, 409 So.2d 1031 (Fla. 1982), this statutory privilege does not apply to communications made by a client to his attorney that were known to be overheard by a third person. Clearly therefore, if mere eavesdropping can defeat the privilege, the direct and repeated statements can likewise. The lack of confidentiality prevented the communication form being privileged under law and accordingly, the denial of the motion to enforce section 914.04 was correct.

Given the fact that the letters alone provided nothing incriminating, the only motion of consequence is the one seeking to prohibit the state from introducing the testimony of Investigator Mundy that appellant admitted having written them. Even without regard to nonconfidentiality, no considerations of immunity come into play since it was appellant who initiated the conversation; the state did not compel his "testimony".

Also, although the motion was filed and denied, the record does not reflect any objection to Investigator Mundy's testimony at trial that appellant had written the letters (R 824). If a defendant who has evidence physically seized from him and who moves, pre-trial, to suppress that evidence, without success, must nevertheless object to its introduction at trial, [see, Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Routly v. State, 440 So.2d 1257 (Fla. 1983)], then the same

principle of the law ought to be applied in this situation. Cf. Diaz v. State, 409 So.2d 68 (Fla. 3d DCA 1982). By failing to object to the testimony of Investigator Mundy, appellant committed procedural default. Accordingly, he has waived any right to contest the admission of evidence from the police officer.

We repeat that the only critical evidence with regard to this issue is the fact that appellant admitted writing the letters. If it was error to admit the letters themselves, it was because they were worthless in terms of relevance, not because of their admission either violated any confidential communication or ignored statutory immunity.

The trial court committed no reversible error in either allowing the letters themselves to be introduced into evidence or allowing Investigator Mundy to testify about appellant's statements regarding the letters.

POINT VIII

THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS THE INDICTMENT.

ARGUMENT

In pertinent language, the indictment of the grand jurors reads:

> . . . DAVID EUGENE JOHNSTON did, on the 5th day of November, 1873, in Orange County, Florida, in violation of Florida Statute 782.04, from a premeditated design to effect the death of MARY WOODVILLE BROWNING HAMMOND, murder MARY WOODVILLE BROWNING HAMMOND in the County and State aforesaid, by stabbing her with a knife.

(R 1918)

This indictment was filed December 5, 1983. Counsel was appointed December 22, 1983 (R 1932), and a motion for statement of particulars was promptly filed (R 1948). A demand for discovery was filed January 4, 1984 (R 1952), and the record further reflects that appellant conducted his last deposition of witnesses on April 6, 1984, that being a continuation of a previous deposition of Patricia Mann (R 1887).

Despite having the full discovery this court has considered as affording a capital defendant more information than he would received in almost any other jurisdiction, O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), appellant, on April 26, 1984, filed a motion to dismiss the indictment pursuant to Florida Rule of Criminal Procedure 3.190(b) (R 2245). The basis of the motion, rather remarkably, was that

the above-quoted language was so vague, indistinct and indefinite that appellant was virtually unable to understand the charge and was so misinformed, misled, and embarrassed that he was utterly unable to defend against the charge, whatever it was.

Your appellee simply cannot understand how such a motion or an issue on appeal based on the denial thereof can be made in either good faith or common sense. The only relationship to the language of the rule is that the motion and the argument should have been embarrassing to present.

In any event, responding to the separate claims, the phrase "from a premeditated design" has been the subject of countless judicial definitions and statements. Counsel for appellant need only to have read but one of those definitions and would have been instantly equipped to understand the concept and the elements thereof.

Since appellant had full utilization of discovery, there was nothing at which he was required to guess. To be sure, he could have and should have prepared a defense for both premeditated murder and felony murder.

We express sheer inability to understand how the allegation "from a premeditated design" appears to allege two separate and distinct types of first degree murder. Whatever is meant by that allegation, we think it falls into the previous discussion, and even a casual reading of pertinent law on the subject would and should have cleared up any confusion.

Appellant next contends that he was unable to receive effective assistance of counsel by virtue of the above-quoted language. He makes the rather bold and factually unsupported statement that "from a premeditated design" did not enable defense counsel to effectively apprise the defendant of the nature of the charge or the elements thereof. This is absurd. If defense counsel could not effectively communicate with Johnston, the it was due to some reason other than the above-quoted language. The second claim in this category is nothing more than a restatement of the one made earlier.

Finally, appellant says that because the particular subsection of section 782.04, Florida Statutes (1983), was not specified in the indictment, this court should remand this case to the lower court "with instructions to dismiss the Indictment and discharge the Defendant from further further prosecution" (Appellant's brief, p. 32). If appellant or his lawyer felt aggrieved by the lack of particular subsection enumeration, then all he or his attorney had to do was read the statute on murder, section 782.04, and he would have immediately seen that subsection (1)(a) is the only part of the law dealing with premeditation as it regards the unlawful killing of a human being. The indictment was legally sufficient. O'Callaghan, supra; Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 103 S.Ct. 182; Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 102 S.Ct. 2916.

POINT IX

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION IN LIMINE.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT X

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISCHARGE COUNSEL AND/OR THE MOTION TO WITHDRAW AS COUNSEL.

ARGUMENT

Here, appellant merely echoes all the reasons presented to the trial court in support of his motions. While he fully and accurately discussed and reiterates those reasons, he fails to meaningfully discuss that which is the subject of this point on appeal, i.e., the order of denial (R 2144). That denial was based on the trial court's observations of appellant during earlier court appearances, the dialogue at those appearances, the testimony of two court-appointed pyschiatrists at a competency hearing, and the reports of those psychiatrists, together with three sets of records of appellant's earlier mental hosptial admissions. The trial judge noted appellant's age, his lack of education, and his intelligence level. Relying upon the opinions of experts as to the mental status of appellant and one opinion stating that appellant ought not to be allowed to represent himself, the trial court found that to discharge counsel and allow self-representation would deprive appellant of a fair trial. The legal principles set forth in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and Cappetta v. State, 204 So.2d 913 (Fla. 4th DCA 19680) 216 So.2d 749 (Fla. 1968), were applied to the particular factual circumstances to reach and support the trial judge's conclusion.

Florida Rule of Criminal Procedure 3.111(d)(3) contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition. This concept has been long recognized in Florida at least as early in Johnson v. Mayo, 40 So.2d 134 (Fla. 1949); see also: Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984), and cases collected therein.

Appellant presents no argument taking issue with the basis of the trial court's denial. This is understandable since an examination of the statements made by appellant himself offered as reasons for discharging counsel quickly shows that the trial judge was imminently correct.

Approximately a week after having the service of the public defender's office, appellant wrote a letter stating that he didn't need the public defenders because he had given ". . .you guys long enough time to work out this case" (R 1272). He claimed that his lawyers had invaded his privacy because they were in possession of letters he had written to his stepmother (R 1281). (She sent the letters to the lawyers). Although he stated that his lawyers told him not to talk to anybody about the case, he continued to contact law enforcement officers and gave them several statements (R 1275). He could give no answer to the trial judge to the questions concerning either his representing himself or being represented by some other lawyer (R 1288). Appellant did not think it was in his

best interest to follow his lawyer's advice (R 1289). What appellant apparently did not want was a lawyer from Orange County and a trial in Orange County (R 1291) because of his belief: "That's the reason why innocent people right now are sitting on death row". (R 1288).

The remarks alone should immediately indicate to any thinking person that appellant simply was incapable of making an intelligent, knowing, and voluntary choice to represent himself. Couple those statements with the other evidence reviewed by the trial court, and the conclusion must and will be that the denial of the motion was entirely correct.

POINT XI

THE EVIDENCE WAS MORE THAN SUFFICIENT TO WITHSTAND APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE.

ARGUMENT

Upon the state's resting its case, appellant first presented the ground for his motion for judgment of acquittal, as restated by the trial court, that the evidence conclusively showed that it was not the defendant, but rather some other person who committed the crime (R 907). He also offered that evidence presented did not exclude the reasonable hypothesis that some third person committed the crime (R 908). Finally, he contended that there had been no evidence presented relating to the element of premeditation (R 908).

A fair interpretation of the first and second grounds yields the immediate conclusion that they are in fact the same contention, i.e., that someone else committed the crime. Such a ground is nothing more than a "bare bones" claim that the evidence presented was insufficient, and as such, was legally insufficient. Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980)

The final ground relating to the alleged lack to premeditation, is, while perhaps legally sufficient, factually puzzling. At that point in trial, the state had offered sufficient evidence, which, if believed by the jury, showed that the death of the victim was the result of a deliberate, calculated and premeditated act. Did appellant honestly mean

to suggest that the death of the victim was the result of an accident?

To have even made the motion in the face of the overwhelming evidence at that point in trial, was to have ignored every circumstance of guilt presented. There was no doubt that the victim was dead and that she had died as the result of criminal agency of another. Appellant was present at the scene and was observed to have what appeared to be blood on his body and clothing. He used a false name to report the incident and lied about how long and how well he knew the victim. He gave a series of conflicting statements to the police and rather interestingly, each statement strongly appeared to be an attempt to explain the results of the on-going investigation. In fact, the only source of the "third person" theory comes from the statements which, considering their content and sequence could have rendered the so-called explanations totally incredible by the trier of fact.

Considering the evidence presented, the trial court was obliged to deny the motion since by virtue of the verdict that was ultimately returned, the case was more than sufficient to be prima facie; indeed, it was conclusive beyond a reasonable doubt. While there was no eyewitness evidence that appellant killed the victim, there certainly was nothing reasonable to support the notion that someone else killed her. See, Williams v. State, 437 So.2d 133 (Fla. 1983) in which this court held that a similar third person theory was lacking

in merit in the face of strong circumstantial evidence indicating guilt. When appellant moved for a judgment of acquittal he admitted all facts presented by the state and all the inferences and conclusions properly derived therefrom. Spinkellink v. State, 313 So.2d 666 (Fla. 1975). The proper conclusion as indicated by the verdict was more than sufficient to withstand the motion.

POINT XII

THE REMARKS OF CERTAIN WITNESSES DID NOT REQUIRE THE GRANTING OF APPELLANT'S MOTION FOR MISTRIAL.

ARGUMENT

Here appellant complains of three separate remarks which he contends were so prejudicial that the trial court should have granted a mistrial.

The propriety of the reference to the bag of pot is something which has not been properly preserved for appellate review. After the remark was made, the record shows the following transpired:

> MR. WOLFE: Your Honor, could we approach the bench?
>
> Your Honor, I would like to object to the reference to the bag of pot as being irrelevant to this case and also prejudicial and, additionally, I think it's sufficient for a mistrial to be granted.
>
> THE COURT: What was it in addition to the pot that he said was in the front seat in clothes that he saw Mr. Johnson wear out of the apartment that night?
>
> Mr. Wolfe, what is that you want the Court to do at this point?
>
> MR. WOLFE: Your Honor, I don't think a curative instruction is going to get out of the mind of the jury the fact that he mentioned a bag of pot and possibly a mistrial would be in order.
>
> MR. AYERS: There had been testimony that he had been drinking that night. There is going to be testimony from Detective Mundy that he said that he was taking L.S.D. so the Court gives a curative

instruction. I don't see how that's going to be prejudicial to the Defendant.

I didn't know the witness was going to say that.

THE COURT: I have nothing before me to rule on at this point.

(Whereupon, the foregoing discussion at the bench, which was held outside the hearing of the jury, was concluded, after which the following proceedings occurred within the hearing of the jury:)

THE COURT: All right. You may proceed, sir.

MR. WOLFE: Thank you, Your Honor. (R 710-711)

The only thing before the trial court for ruling was an objection to the remark as being irrelevant and prejudicial. The best appellant could offer was his belief or thought that a mistrial should be granted, but no such motion was actually made. It is possible that after the prosecutor reminded appellant of the nature of the forthcoming evidence, he abandoned his complaint. There was introduced considerable evidence regarding the appellant's heavy drug usage on the evening in question such that any reference to a mere bag of pot could hardly be comparatively prejudicial.

The other two remarks deal with references to prior incarceration. Appellant fashions his argument here as one based on a "Williams Rule" concept and contends that the only possible inference that the jury could draw from the particular remarks was one of evidence of other crimes with

the result that his character was improperly attacked. No such basis of objection was made at trial, however. When appellant belatedly spoke, he offered no grounds whatsoever in support of his general request for a mistrial (R 755). Even if the objection and motion had been timely, nothing was offered in support thereof to afford the trial court a basis for granting the relief requested.

The last statement was the subject of an objection based on relevancy as previously agreed upon and the trial court sustained the objection, instructed the jury to disregard the remark, but denied a motion for mistrial (R 834). Despite the sustaining of the objection, it is appellee's position that the remark was relevant due to the particular circumstances of the statement appellant gave to Investigator Mundy. It must be remembered that appellant called the police and told Investigator Mundy that he wanted to make a deal with the judge (R 832). The relevancy of an unsolicited statement desiring to work a deal is self-evident; at the very least it indicated knowledge of guilt. That a prior experience in jail might have contributed to the motivation for requesting a deal is further relevant evidence indicating guilt. What is most noteworthy is the fact that evidence of appellant's prior incarceration did not come from any external source. The source of that information was appellant himself, and accordingly, the cases upon which appellant relies do not support his position.

For example, in Hodges v. State, 403 So.2d 1375 (Fla.5th DCA 1981), the state specifically introduced evidence of a prior sexual battery occuring some three years before the offense on trial. This was a conscious effort by the prosecution to present similar fact evidence. It was ruled, however, to be irrelevant to the only issue at that particular trial, to-wit: consent of the victim. The prejudicial evidence in Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980) was offered over objection of the defendant, and represented hearsay. Likewise, in Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983), the evidence of the defendant's prior felony record was consciously introduced by the state over the objection of the defendant.

The other cases appellant cites are also inapposite. In Lawson v. State, 360 So.2d 786 (Fla. 2d DCA 1978), the evidence found to be prejudicial was provided by a witness who gave repeated testimony regarding other robberies. Each time defense counsel moved for a mistrial and each time the trial court denied the motion. Because of the number of prejudicial references, the court concluded that the cumulative effect was to show only that the defendant was an evil person who had a propensity to commit evil acts. The court opined that the trial court should have instructed the witness after the first instance of impropriety to refrain from further comment and should have made sure he understood. 360 So.2d at 787. The same type of prejudice is foudn in Albright v.

State, 378 So.2d 1234 (Fla. 2d DCA 1979), in that the prejudicial evidence came from two co-defendants who had negotiated pleas in return for testimony against the defendant. The improper comments were deemed repetitious, unnecessary and unduly prejudicial. The comments focused only on the defendant's aberrant vulgar behavior and as a cumulative effect, did nothing but impugn his character. In Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982), the prosecutor, on cross-examination, asked a pointed question which automatically injected the consideration of an additional crime. The question was so improper that it was considered only to have had as its objective, the establishment of criminal propensity. In Lewis v. State, 377 So.2d 640 (Fla. 1979), this court only considered whether the prosecution's cross-examination of a witness was properly responsive to an effort to establish the good character of the defendant.

Left remaining are the cases of Clark v. State, 337 So.2d 858 (Fla. 2d DCA 1976) and Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982). In Clark, the defendant was on trial for breaking and entering with the intent to commit a felony and grand larceny of certain drugs and equipment from a doctor's office. An apparent gratuitous statement from a police officer to the effect that he had arrested the defendant for sale and possession of heroin was found to be sufficiently prejudicial so as to have warranted a mistrial because the reference to the sale and possession of heroin went "too far"

with regards to the charges being tried. As the court mentioned, those involved in the trafficking of heroin are held in the highest disrepute by law abiding members of the community. This prejudicial interjection was considered to be too much for a juror to ignore when deliberating the guilt of the crime on trial. (Clark does not condemn the reference to the bag of pot even if it had been properly preserved since it is a reference to pot in a first degree murder trial. It might have been different had the trial been for the possession of pot and a reference to murder had been made.) In Bates, a police officer testified to a statement of the appellant which was told to him by the victim of the sexual battery in that case. Through hearsay testimony, it was revealed that the defendant there had been imprisoned before. An objection was made that such a remark presented an impermissible prejudicial attack on the character of the defendant. The remark was found to have required the granting of the defendant's motion for mistrial. The only similarity of the facts in Bates and the case at bar is a statement from the defendant that he had been in prison before. There the similarity stops and in a very distinguishing manner. There, the information came from a police officer who heard it from a person other than the defendant. Here, the testimonial evidence is from a police officer, but is it being related in the form of a direct statement made to the officer by the defendant himself.

In circumstances such as these, this court has both established and continuously adhered to the rule that the necessity to declare a mistrial should be exercised with great caution and should be done only in cases of absolute necessity. Salvatore v. State, 366 So.2d 745 (Fla. 1978). That rule was applied in Wilson v. State, 436 So.2d 908 (Fla. 1983) to uphold the denial of a motion for mistrial made when a prosecutor asked a question which might have created an impression with the jury that the defendant had been arrested for other crimes. See also, Dunn v. State, 341 So.2d 806 (Fla. 3d DCA 1977); Riley v. State, 367 So.2d 1091 (Fla. 3d DCA 1979).

The facts in Williams v. State, 354 So.2d 112 (Fla. 1978) contain a witness's reference to the defendant having been previously imprisoned. That reference, without more, was held not to have been sufficient to require a mistrial in light of the curative instruction given by the court.

Another such case is Warren v. State, 443 So.2d 381 (Fla. 1st DCA 1983), in which a prosecutor asked a witness whether he knew the two defendants. The reply was: "I seen them -- when I was down in prison --," 443 So.2d 383. A motion for mistrial was made and denied and no request for curative instruction was made. In considering the propriety of that statement, the court found that although the remark was improper, it was not so egregious as to merit a mistrial. The rule of Salvatore v. State, supra, was utilized to conclude that the most the error required was a curative instruction.

Finally, in Ferguson v. State, 417 So.2d 639 (Fla. 1982), the offending witness was an original co-defendant who, while testifying for the state, stated: "the first time . . .my first time in prison, all three of us [Ferguson included] was together." 417 So.2d at 642. The general objection and general motion for mistrial were faulted by this court as insufficient. The absence of a request for curative instruction was also deemed critical.

In language which controls this issue, this court stated:

> The defendant now contends that a prior imprisonment was irrelevant to his guilt or innocence in this case; the only result would be to show that the defendant's "bad character". Such remarks may be erroneously admitted yet not be so prejudicial as to require reversal. Darden v. State, 329 So.2d 287 (Fla. 1976), cert. denied, 429 U.S. 1036, 97 S.Ct. 729, 50 L.Ed.2d 747 (1977); Thomas v. State, 326 So.2d 413 (Fla. 1975). In Smith v. State, 365 So.2d 405 (Fla. 3d DCA 1978), the court noted that any prejudice arising from the admission of testimony indicating defendant's prior incerceration could have been corrected by an instruction to the jury to disregard the testimony. The court held that in the absence of a defense request for such an instruction, the trial court properly denied the motion for a mistrial. Our review of this record persuades us that the admission of Archie's testimony in this matter was not so prejudicial as to warrant a reversal. See Clark v. State, 363 So.2d 331 (Fla. 1978).

From the above it is seen therefore that the particular remarks now complained of were not sufficient to have required the granting of a mistrial. The first remark, inadvertent and perhaps improper, was not so egregious. The second remark was not timely objected to and is practically identical to the one appearing in Warren v. State, supra. The final remark, we contend, was relevant for reasons discussed above and even if it were considered improper, was not made on the basis of a request for a curative instruction and consequently, a mistrial was not required.

POINT XIII

APPELLANT SUFFERED NO PREJUDICE BY BEING REQUIRED TO WEAR LEG RESTRAINTS.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT XIV

THE PROPRIETY OF THE TRIAL COURT'S SWEARING IN OF PROSPECTIVE JURORS IMMEDIATELY UPON ACCEPTANCE HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

ARGUMENT

The record amply supports the notion that in an obvious effort to move the case along, the trial court exercised its sound discretion [see, Mathis v. State, 45 Fla. 46, 34 So. 287 (Fla. 1903)] and utilized a procedure whereby after full and complete examination, once a prospective juror was accepted by the state and the defense, he or she was sworn for duty. Appellant objected to this procedure contending that it prevented back-striking. The court responded that the procedure was not designed to prevent back-striking in general (R 167).

Whether the court's statement was accurate is something that will never be known since at no time did appellant attempt to back-strike a previously sworn juror. It follows therefore, that none of the jurors ultimately selected was in any way unacceptable.

While dicta in Grant v. State, 429 So.2d 758 (Fla. 4th DCA 1983) has been subsequently elevated to a blanket prohibition against back-striking in general, see, King v. State, 461 So.2d 1370 (Fla. 4th DCA 1985), before the procedure may be reviewed on appeal, it must be properly preserved by virtue of an attempt to back-strike a previously sworn juror. (This was done in Denham v. State, 421 So.2d 1082 (Fla. 4th DCA 1982),

relied upon in Grant, supra.)

This requirement has been approved by this court in Rivers v. State, 458 So.2d 762 (Fla. 1984) not only as a general notion of procedural default, but also as something subject to harmless error consideration.

POINT XV

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO QUESTIONS ASKED ON REDIRECT EXAMINATION.

ARGUMENT

Without citation of authority or any meaningful argument, appellant simply asserts that he is entitled to a new trial because of the trial court allowing the state to ask two isolated questions on redirect examination of two of its witnesses.

At least as early as Noeling v. State, 40 So.2d 120 (Fla. 1949), this court espoused the general notion that a party may re-examine a witness about any matter brought up on cross-examination. As recently as Maggard v. State, 399 So.2d 973 (Fla. 1981), the court recognized that a trial court has a broad range of discretion with regard to the examination and cross-examination of witnesses, even in a capital case.

Given this broad discretion, it is fairly easy to sustain the trial court's ruling in both instances complained of. On cross-examination of witness Fritz, appellant asked whether she heard anything going on in her grandmother's apartment (R 481). The witness answered that no, she did not. The subject matter of that question was, obviously the witness's ability to hear anything in the next apartment. On redirect therefore, the prosecutor established that the witness was a sound sleeper and did not wake up easily at sounds.

He established that she had lived in the apartment since May of 1983 and most importantly, that sound did not travel through the walls separating the two apartments (R 482). In fact, after the objection was made, it was established that the witness never heard anything coming from her grandmother's apartment. If those questions directed to the subject matter were not proper, then we need to redefine the meaning of the word relevance.

In the second instance, the witness, on direct examination directly testified that appellant had become upset at one time during their conversation (R 506). On cross-examination, defense counsel again opened up the area of appellant's demeanor at the scene. He directly asked the witness whether the appellant appeared to be upset (R 512). The question to which appellant objected was nothing more than determining just how upset he was. Obviously, if someone becomes hostile and make some kind of threatening gestures towards police officers, then common sense dictates such a person is fairly upset. The trial court abused absolutely no discretion in overruling the objections to the particular questions.

POINT XVI

THE ONE PHOTOGRAPH DEPICTING THE VICTIM AS SHE WAS FOUND BY THE POLICE WAS PROPERLY ADMITTED.

ARGUMENT

Here appellant complains about the admission of a single photograph and contends that its introduction so severely prejudiced his case that he is entitled to a new trial.

The only case he relies upon is O'Berry v. State, 348 So.2d 670 (Fla. 3d DCA 1977). There the court held that the admission of three exhibits, one of which being a color photograph of the victim was error, but not reversible error. While we have no quarrel with that holding, we note that the finding of error was predicated in part on the basis that the color photograph was cummulative since a black and white photograph of the same scene had previously been introduced.

Whatever the view of the district court in O'Berry, the view of this court has been repeatedly stated by reference to State v. Wright, 265 So.2d 361 (Fla. 1972), such that despite a photograph being gruesome or inflammatory, the test for admissibility is not one of necessity, but rather relevance. See, e.g., Jackson v. State, 359 So.2d 1190 (Fla. 1978); Foster v. State, 369 So.2d 928 (Fla. 1979); Gore v. State, 10 F.L.W. 419 (Fla. Aug. 22, 1985).

That identity and cause of death were established by the medical examiner and other witnesses is of no consequence; what is not needed may still be relevant. Foster,

supra.

The relevance of this single photograph is obviously clear. The photograph depicts the condition of the victim when discovered by the police and corroborates the cause of death in addition to very clearly indicating a premeditated design. No error occurred by admitting the photograph.

POINT XVII

THE PROPRIETY OF ALLOWING THE POLICE TECHNICIAN TO TESTIFY HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

ARGUMENT

Appellant claims that the trial court erred in denying his motion for new trial regarding this issue. An examination of the motion for new trial reveals that the only possible relationship between the motion and his issue is found in paragraph 3 (c) (R 2400) which refers to all objections made at trial. We contend that this is legally insufficient to raise this issue.

Even if the motion for new trial were sufficient, reference to the objection made at trial quickly reveals that appellant never objected to the technician's testimony. When the technician was asked whether he had performed any tests on the clothing of appellant, defense counsel only stated:

> MR. WOLFE: Excuse me, Your Honor. I don't believe this witness has been qualified as an expert in any kind of testing.

After the technician stated that he ran a Luminol test on the clothing, the following transpired:

> MR. WOLFE: Excuse me, Your Honor. I would like to raise the same objection. I would object as to the value and accuracy of that test and the results by this witness.

If a legal objection can be extracted from the above, it can only be one relating to the "value and accuracy" and the "results" of the test. Whatever that means, it is clear

that no objection on grounds of admissibility was lodged.

If the above were not present, the admission into evidence of the testimony was proper. The witness only testified that he performed a presumptive test and he related the results thereof. Indeed, defense counsel probably did more to establish the qualifications of the witness on cross-examination (R 651-653).

That a non-expert witness may nevertheless testify about certain matters was established in this state in Peacock v. State, 160 So.2d 541 (Fla. 1st DCA 1964) and recognized by this court in Jones v. State, 440 So.2d 570 (Fla. 1983). There, the principle in Peacock was held properly applicable to the opinion of a police officer who had training in firearms and had extensive work as an evidence technician. Such testimony is admissible; its weight, credence and effect are something to be considered by the trier of fact.

POINT XVIII

TRIAL COURT DID NOT ERR IN REFUSING TO GIVE INSTRUCTIONS ON AGGRAVATED BATTERY, BATTERY AND ASSAULT*

ARGUMENT

When, in a first degree murder prosecution, the evidence shows that the victim died, the case is a death case, not an assault case. This was established in Sadler v. State, 222 So.2d 797 (Fla. 2d DCA 1969). The principle of Sadler, supra, was specifically repeated and approved in Brown v. State, 245 So.2d 68 (Fla. 1971) and reaffirmed in Martin v. State, 342 So.2d 501 (Fla. 1977). See also, Fla. R. Crim. P. 3.490. There is no merit to this point.

*Appellant points to the motion for new trial as being the source of this issue. However, no mention thereof is present (R 2400). The issue was established upon the appellant's request for instructions during charge conference (R 919).

POINT XIX

THE JURY WAS PROPERLY INSTRUCTED ON CIRCUMSTANTIAL EVIDENCE.

ARGUMENT

This issue was raised and summarily rejected in Medina v. State, supra.

POINT XX

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL MADE DURING SENTENCING PHASE OF PROCEEDINGS.

ARGUMENT

While it is true that appellant made a motion for mistrial based on comments made by the prosecutor, the motion was legally insufficent for two reasons.

In the first place, the motion fails to identify any particular comment which appellant found objectionable. The trial court was not required to guess which remark was being made the basis of the motion for mistrial.

In the second place, even if the motion had been sufficient, if was required to have been made no later than the close of the prosecutor's argument. State v. Cumbie, 380 So.2d 381 (Fla. 1980). The motion was not only made after the prosecutor concluded, but also after the defense had presented its closing remarks, and indeed, it came after the jury had retired for its deliberations. By failing to object at the proper time, appellant committed procedural default and thereby waived the right to raise this point on appeal. Clark v. State, 363 So.2d 331 (Fla. 1978).

Disregarding the above, in order for prosecutorial misconduct to invalidate the penalty phase of a murder trial it must be egregious and so outrageous that it taints the validity of the jury's recommendation. Bertolotti v. State, 10 F.L.W. 407 (Fla. Aug. 15, 1985). The one isolated remark

in this case is certainly less offensive than the several which were made in Bertolotti. What's more, the trial court, sua sponte, directed the jury to disregard the comment and there is and can be no indication that the jury's recommendation was in anyway influenced by the one remark.

POINT XXI

THIS POINT IS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

ARGUMENT

As in the preceding point on appeal, this issue was not made the subject of any objection below, and based on the identical authorities, the issue has not been preserved for appellate review.

In spite of the above, when appellant was read his rights, he was neither under arrest nor in custody; it was he who caused the police officers to be on the scene in the first instance. Without the existence of custody, it is not even necessary to apply the harmless error rule recently announced in State v. DiGuilio, 10 F.L.W. 430 (Fla. Aug. 29, 1985).

Regarding the comments made during the closing argument, the prosecutor was not commenting on appellant's failure to testify; he was commenting on the evidence. The prosecutor referred to the statement appellant made regarding the knife that he picked up, threw on the bed, and then put under the mattress. The prosecutor simply referred to the fact that appellant's statement contained no explanation for his actions. No reference is made, nor is there even a suggestion that appellant failed to testify at trial. The prosecutor was merely reminding the jury of evidence already introduced and drawing the obvious conclusion that appellant was trying to hide evidence (R 983).

Even if made the basis of a proper objection, no error would have occurred had the trial court allowed the testimony of the witness and/or the comment of the prosecutor.

POINT XXII

TRIAL COURT PROPERLY SENTENCED THE APPELLANT TO DEATH

ARGUMENT

Although appellant does not dispute the finding of the trial court that he had been previously convicted of a felony involving the threat of violence and a felony involving the use of violence,he nevertheless contends that since no harm actually came to the victims of the respective violent felonies, the convictions "should not support a death sentence". The resultant harm, or lack of it, to a victim of a violent felony is irrelevant; of concern is the character of the defendant and whether he is a type which has previously resorted to violent acts on other human beings. See, Lewis v. State, 398 So.2d 432 (Fla. 1981).

Appellant challenges the finding that the capital felony was committing during the course of a burglary. He relies solely on the testimony of a police investigator that the victim's home appeared to have been made to look like a burglary had taken place. (The reason that the home appeared that way is more than likely because a burglary had taken place.) He contends that since the only evidence indicating his action is found in his statement which indicates that he took the silverware and teapot after the victim was dead, he at most is guilty of grand theft of the second degree. In his opinion therefore, this aggravating factor should not have been found.

What is fatal in appellant's reasoning is the failure to understand that under Florida law, burglary is defined as entering or remaining in a structure with the intent to commit an offense therein. §810.02, Fla. Stat. (1983) When a person enters or remains in a structure with an intent to commit any offense and a capital felony occurs, then it is a properly aggravated captial felony. See, Routly v. State, 440 So.2d 1257 (Fla. 1983).

Regarding the finding that the capital felony is especially heinous, atrocious and cruel, appellant relies primarily on the fact that the victim did not suffer enough in order to die is this manner. We totally reject such assertion. While this factor has generally been defined as applying when the victim suffers agonizingly over the prospect of death or dies as the result of an extremely torturous and cruel manner, the factor has not been restricted only to consideration of the victim. As recently stated in Mills v. State, 10 F.L.W. 498 (Fla. Aug. 30, 1985): "Whether death is immediate or whether the victim lingers or suffers is pure fortuity. The intent and method employed by the wrongdoers is that needs to be examined." 10 F.L.W. at 500. The intent and method utilized by this appellant causes little difficulty in suggesting that his act fully satisfied this aggravating factor. The victim in this case was an eighty-four year old obviously frail and defenseless woman who had gone to sleep for the night. She was strangled and stabbed

three times through the neck and twice in the upper chest with a knife. As the trial court concluded, there was no doubt that the victim was in terror and experienced considerable pain from the attack of the defendant. The motivation for this type of murder is beyond belief; the sheer suffering of the victim is beyond words.

This factor was satisfied beyond a reasonable doubt and properly found by the trial court. In Brown v. State, 473 So.2d 1260 (Fla. 1985), this court approved a finding of heinous, atrocious and cruel based on the facts that the victim was an eighty-one year old semi-invalid who was beaten, raped and killed by asphyxiation; that her hands her tied behind her back and a gag placed in her mouth and that either the gag or a garrote placed around her neck caused death. In Wright v. State, 473 So.2d 1277 (Fla. 1985), the finding of this factor was not apparently challenged but nevertheless approved based on the fact that the defendant entered the victim's home took money from a purse and then killed a seventy-five year old woman because she recognized him and he did not want to go back to prison.

Appellant complains that the trial court failed to find the existence of four mitigating factors. All instances of mitigation were specifically mentioned by the trial court in his findings of fact. Although the court was legally bound to consider all factors in mitigation, both statutory and otherwise, the decision of whether a particular

circumstance was proven and the weight to be given it rests solely with the trial judge and jury. Smith v. State, 407 So.2d 894 (Fla. 1981); Card v. State, 453 So.2d 17 (Fla. 1984); Lemon v. State, 456 So.2d 885 (Fla. 1984); Stano v. State, 460 So.2d 890 (Fla. 1984).

By its recommendation of death, the jury obviously gave no weight to the circumstances appellant offered to mitigate the crime he committed. Likewise, the judge gave no weight to those facts, and thus, properly concluded that death was the appropriate sentence.

CONCLUSION

Based on the arguments and authorities presented herein, the judgment and sentence should be affirmed.

Respectfully submitted,

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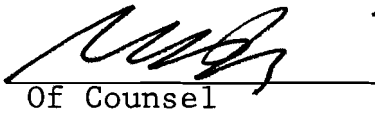
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U. S. mail to Ronald R. Findell, Esquire, Attorney for Appellant, Bradshaw Building, Suite 101, 65 North Orange Avenue, Orlando, Florida, 32801, this 28 day of October, 1985.



Of Counsel